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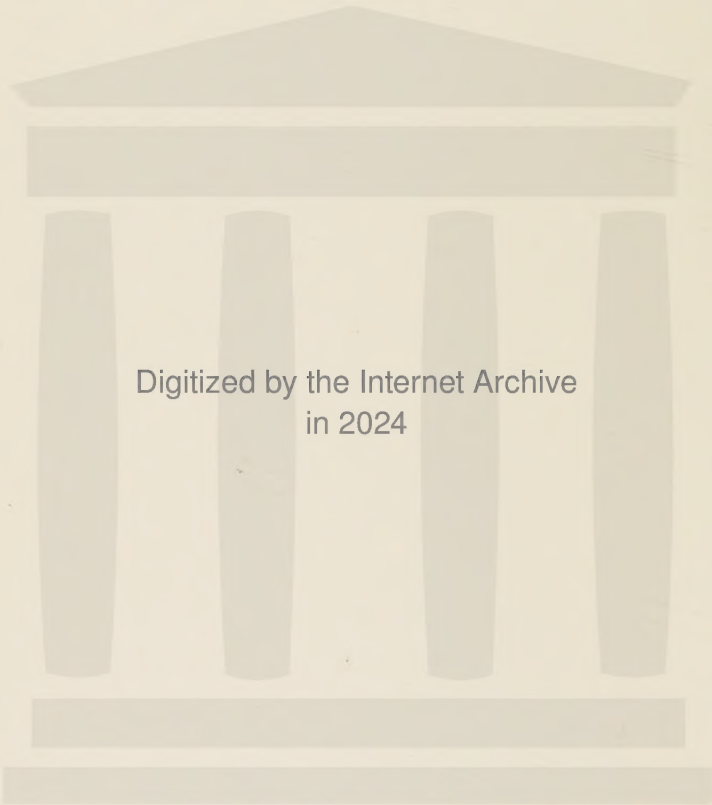
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1905.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1905.

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Page	*Line*	*For*	*Read*
292	foot-note (2) *add* [1904] 1 K. B. 194.		
533	1 from bottom	*Paines, Blyth & Huxtable.*	*Paines.*
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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1904. 1905.

HIPPISLEY *v.* KNEE BROTHERS.

1904
Oct. 27.

Principal and Agent—Secret Profit received by Agent without Fraud—Right of Agent to retain his Commission.

The plaintiff employed the defendants, auctioneers, to sell goods for him by auction upon the terms that they were to be paid a lump sum by way of commission, and were further to be paid "all out of pocket expenses," including the expenses of printing and advertising. The defendants in due course sold the plaintiff's goods. In rendering their account of the out of pocket expenses to the plaintiff they debited him with the gross amounts of the printers' bill and of the cost of advertising in the newspapers, they having in fact received discounts both from the printers and the newspaper proprietors—a fact of which the plaintiff had no knowledge. There was evidence of a general custom for printers and newspaper proprietors to deal with auctioneers as principals, and to allow them a trade discount off their retail charges, which discount they would not allow to the auctioneers' customers if they dealt with them directly, and the defendants in omitting to disclose the fact of the discounts to the plaintiff did so in the honest belief that they were lawfully entitled under the custom to receive the discounts and retain them to their own use:—

Held, that although the defendants were not entitled to debit the plaintiff with the gross amounts of the printing and advertising bills,

1904

HIPPISLEY v. KNEE BROTHERS.

inasmuch as by the terms of the employment they were only to be paid their actual out of pocket expenses, yet, as they received the discounts without fraud, and as the duty to account correctly for the out of pocket expenses was merely incidental to and separable from their main duty connected with the sale of the goods, the omission to disclose the receipt of the discounts to the plaintiff did not disentitle them to retain their commission.

Andrews v. *Ramsay*, [1903] 2 K. B. 635, distinguished.

APPEAL from the Bristol County Court.

The plaintiff employed the defendants, a firm of auctioneers, to sell some pictures and other articles for him by auction upon terms which were set out in a letter from the defendants to the plaintiff and dated July 25, 1903, and which was as follows: "Referring to our interview with you as to the sale of your furniture and effects, we now beg to confirm the terms arranged, viz., 5 per cent. on all lots sold and all out of pocket expenses in addition, which includes advertisements, printing and posting bills, printing and circulating catalogues, porters' time, postages, use of sale-room, &c. The cost of removal from the various places, including clerk's time checking, to be 4*l.* 10*s.* 8*d.* Use of sale-room to be 10*s.* per week to date of sale. Minimum commission on sale for personal services to be 20*l.* Any other work, price to be arranged." The defendants, in pursuance of the said employment, instructed a firm of printers to print the posters and catalogues. The printers did the work and debited the defendants' account with the sum of 13*l.* 9*s.*, that being the price which they would have charged to any ordinary customer. The printers, however, allowed to the defendants because they were auctioneers the trade discount of 10 per cent., amounting to 1*l.* 6*s.* 10*d.* The defendants also advertised the sale in certain newspapers, and upon the gross payments for the advertisements, amounting to 14*l.* 6*s.* 4*d.*, they received from the newspaper proprietors a discount of 10 per cent., amounting to 1*l.* 8*s.* 7*d.* The sale took place in due course, and the plaintiff's goods were sold for an aggregate amount of less than 400*l.*, whereupon the minimum commission of 20*l.* became payable. The defendants, in the account sent by them to the plaintiff, charged him with the full amount of the printers' bill, 13*l.* 9*s.*, and of the charges for newspaper

advertisements, 14*l.* 6*s.* 4*d.*, without making any rebate to him in respect of the discounts allowed to them, and, having deducted from the gross sum realized by the sale the sum of 20*l.* for minimum commission with the two above-mentioned sums of 13*l.* 9*s.* and 14*l.* 6*s.* 4*d.*, and a further sum for money lent, they paid the balance to the plaintiff. Subsequently, the plaintiff having discovered the fact of the defendants having received the said discounts without disclosing the fact to him, brought his action in the county court to recover the two sums of 1*l.* 6*s.* 10*d.* and 1*l.* 8*s.* 7*d.*, and also the 20*l.* minimum commission, on the authority of *Andrews* v. *Ramsay*. (1) At the hearing evidence was given of a general custom for printers and newspaper proprietors to deal with auctioneers as principals, and to allow them as trade customers a trade discount off their retail charges, the whole of the retail price being charged by the auctioneers against the vendors. The defendants honestly believed that they were entitled under this custom to receive the said discounts and retain them to their own use. The plaintiff admitted that he knew there was a custom for newspaper proprietors to allow a discount to auctioneers, but he did not know the amount of it, or that the defendants would receive such a discount in the present case. He was not aware that there was any custom for printers to allow such a discount, or that the defendants would receive it from the printers. The county court judge held that the defendants in contracting with the printers and newspaper proprietors acted as principals and not as agents for the plaintiff, that the plaintiff was not damnified by their receipt of the discounts, and that the defendants were consequently entitled to retain them. He accordingly held that the plaintiff could not recover any one of the three sums claimed. The plaintiff appealed.

Clavell Salter, K.C., and *Soper*, for the appellant. The defendants were not entitled to charge the plaintiff with the amount of the discounts, for in incurring the expenses for printing and advertising they were acting as agents for the plaintiff.

(1) [1903] 2 K. B. 635.

1904

HIPPISLEY v. KNEE BROTHERS.

The fact that the printers and newspaper proprietors looked to them for payment did not make them any the less agents. Then if so, the well-established rule as to secret profits made by agents applies. In *Parker* v. *McKenna* (1) Lord Cairns L.C. thus stated the rule: "Now the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. . . . All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency." Further, there is in the present case the additional reason that the defendants expressly stipulated for their "out of pocket expenses" and nothing more, and under that term cannot be included a sum which they did not in fact pay. The existence of the custom for auctioneers to receive these discounts and the consequent bona fides of the defendants are immaterial. The only material question is whether the plaintiff in fact knew that his agents were being allowed the discounts, and the finding is that he did not. Then if the defendants are not entitled to charge the plaintiff with the discounts, neither are they entitled to their commission of 20*l.*: *Andrews* v. *Ramsay* (2), where it was held that an agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal, but is not entitled to any commission from his principal. No distinction can be drawn between that case and the present upon the ground that there the secret profit was received from the purchaser and here from third persons; the net result to the vendor is the same. The advertising and printing are just as important parts of the agency as the conduct of the sale itself in the auction-room, and there was one entire remuneration for all the duties that the defendants were employed to perform—namely, the commission of 20*l.*

Duke, K.C., and *Thornton Lawes*, for the defendants.

(1) (1874) L. R. 10 Ch. 96, at p. 118. (2) [1903] 2 K. B. 635.

[LORD ALVERSTONE C.J. We are satisfied that there is no case to recover back the commission, and only wish to hear the defendants on the subject of the discounts.]

There is a distinction between cases in which a person is acting solely as agent for a principal in making a contract and cases in which the principal employs an agent who to his knowledge will have to make contracts with third persons on his own behalf for which he will have to pledge his own credit. Where the agent in the known course of business makes a contract on which he is liable he is entitled to make a profit on it, and not merely to have an indemnity against his out of pocket expenses. The custom of allowing these discounts to auctioneers is so universal that the plaintiff must have known, or ought to have known, that the defendants would receive them; indeed, he admitted that he knew there was a custom for newspaper proprietors to allow them on advertisements.

In *Great Western Insurance Co.* v. *Cunliffe* (1) the defendants, insurance brokers, were employed by the plaintiffs to effect reinsurances for them. There was no provision for their remuneration for this work by the plaintiffs, and according to the custom they received from the underwriters a discount of 5 per cent., and also at the end of the year a further 12 per cent. on the balance of the accounts if favourable. The plaintiffs knew of the 5 per cent. discount, but did not know of the 12 per cent. But it was held that as the latter allowance, like the former, was according to a well-established practice which the plaintiffs might have ascertained if they had taken the trouble to inquire, the defendants were entitled to retain it. Similarly in *Baring* v. *Stanton* (2), where a shipowner employed agents to effect insurances for him on his ships, and they in their accounts charged him with the full premiums, although they had received a 5 per cent. brokerage from the underwriters and also a 10 per cent. discount for cash, in accordance with the usual practice, it was held that, as the allowances were usual and the shipowner had never inquired on what terms the agents effected the insurances, he could not object to their retention by the agents. Mellish L.J. said: "If that"—the

(1) (1874) L. R. 9 Ch. 525. (2) (1876) 3 Ch. D. 502.

1904

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practice—"is generally known and acquiesced in I cannot conceive that it is a fraud upon anybody. It may be a misfortune to Mr. Stanton that, being an American, he really did not know the usage in London. But if a person comes and trades in London he must make himself acquainted with the usages in London." The fact here that the contract expressly mentions "out of pocket expenses" is immaterial; it does not add anything to the rights and duties arising out of the ordinary relation of principal and agent.

LORD ALVERSTONE C.J. I will deal first with that portion of the plaintiff's claim which relates to the two sums of 1*l.* 6*s.* 10*d.* and 1*l.* 8*s.* 7*d.*, which it is agreed are the amounts of the discount which the defendants, the auctioneers, received from the printers and the newspaper proprietors respectively on account of the printing and advertisement orders executed in connection with the sale which he conducted for the plaintiff. Now the employment of the defendants was in writing, and although the alleged custom of auctioneers to receive such discounts for their own use is very material in connection with the question of bona fides, it is sufficient in order to determine what the rights of the parties were in this particular case to look at the terms of the contract itself. The terms, which were confirmed by the defendants' letter of July 25, were: "5 per cent. on all lots sold, and all out of pocket expenses in addition, which includes advertisements, printing and posting bills, printing and circulating catalogues, &c. . . . Minimum commission on sale for personal services to be 20*l.*" I draw attention to the provision that there was to be a minimum commission of 20*l.* The defendants thereby insured themselves against the risk of their work being unremunerative, the intention being that they were to look to that commission alone for the remuneration of their personal services, including their services in connection with the printing and the advertisements. So that even if there could have been a doubt as to the meaning of the words "out of pocket expenses," the provision as to the minimum commission makes the matter free from doubt, and renders it abundantly clear that the defendants were to have the

20*l.* commission and their actual out of pocket expenses, but nothing more. Therefore I think that upon that ground, wholly apart from the broader ground upon which Mr. Salter relied, the plaintiff is entitled to recover the two sums of 1*l.* 6*s.* 10*d.* and 1*l.* 8*s.* 7*d.*, and to that extent the judgment of the county court judge must be reversed. Mr. Duke, indeed, contended that the Court ought to allow these discounts to the defendants upon the ground that the custom for auctioneers to take them was so general that the plaintiff must have known, or ought to have known, that they were in fact being received. Of course, if to the knowledge of the principal they were being received by the agent, the profit ceased to be secret and the question would not arise; but where there is no knowledge the agent ought to account, and it is only honest that he should conduct his business on the principle of his liability so to account. The two authorities cited by Mr. Duke were cases in which it was obvious that the principal knew that the agent was being remunerated by third parties; therefore they in no way conflict with the principle which I have endeavoured to lay down. Unfortunately there appears to prevail in commercial circles in which perfectly honourable men desire to play an honourable part an extraordinary laxity in the view taken of the earning of secret profits by agents. The sooner it is recognised that such secret profits ought to be disapproved of by men in an honourable profession, the better it will be for commerce in all its branches.

The other claim made by the plaintiff, and in respect to which we did not call upon the defendants' counsel, was that in consequence of the defendants' conduct they were not entitled to retain the 20*l.* which they had deducted from the gross proceeds for their commission, and in support of that claim Mr. Salter relied upon the judgment of this Court in *Andrews* v. *Ramsay* (1), where we held that a dishonest agent could not recover any commission at all. I desire, speaking for myself, to say that in this case I am satisfied that there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled

(1) [1903] 2 K. B. 635.

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to do under the contract: they thought that by reason of the alleged custom they were entitled to deduct from the proceeds of sale the gross amounts of the advertising and printing bills. That is enough to differentiate the present case from *Andrews* v. *Ramsay* (1), where we were dealing with an agent who acted with downright dishonesty. But Mr. Salter went further, and contended that if there has been a failure by the agent to account for a secret discount received, even though that failure may have been due to a bonâ fide mistake, he is not entitled to receive any commission or remuneration for his services from the principal. I am not prepared to go that length. If the Court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform. In my opinion, the neglect by the defendants to account for the discounts in the present case is not sufficiently connected with the real subject-matter of their employment. If the discount had been received from the purchasers the case would have been covered by *Andrews* v. *Ramsay* (1); but here it was received in respect of a purely incidental matter; it had nothing to do with the duty of selling. It cannot be suggested that the plaintiff got by one penny a lower price than he would otherwise have got. Therefore I come to the conclusion that, so far as the 20*l.* commission is concerned, the plaintiff is not entitled to succeed.

KENNEDY J. I am of the same opinion. Upon the general question with regard to the discounts received by the defendants on these bills I think the plaintiff is entitled to succeed. Out of pocket expenses were all that the auctioneers here were entitled to claim from the principal who employed them, and in fact they claimed what was not an out of pocket expense. It has been suggested that the meaning of the expression "out of pocket expenses" might be qualified by the knowledge of the principal that in some of the contracts into which the

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auctioneers would necessarily enter they might possibly be allowed a discount. It appears to me quite impossible, as it would be unjust, to act upon such a suggestion. If a principal, when contracting for the services of an agent, is told that the agent is going to receive a profit out of the agency beyond the remuneration that the principal is to pay, there can be no possible harm in the agent receiving it; but, unless it has been, in this way, authorized by the principal, the receipt of such a profit is an indefensible act. I quite agree with my Lord that in this case the defendants were only doing what they honestly believed to be right having regard to a general practice; but I should be sorry to say that the practice itself is an honest one, if it is to be taken as extending to cases in which the fact that the profit will be received and kept by the agent is not brought to the knowledge of the employer.

With regard to the 20*l.* claim, I agree with my Lord that this is not one of the cases in which it would be just to deprive the agent of his agreed remuneration as well as of his secret profit. I feel it is difficult to lay down any definite rule upon the subject with confidence, but I would venture to suggest the following: that where the agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it—and I here use that word "unfaithful" as including a breach of obligation without moral turpitude—it may be that he will forfeit his remuneration, just as in certain cases a captain of a ship might be held in the Admiralty Court to forfeit his wages as a result of misconduct in any branch of his duty as a captain; but where the several duties to be performed are separable, as to my mind they are in the present case, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties. Here the auctioneers were employed for a certain commission to act faithfully as auctioneers. If they had improperly by connivance sold to a purchaser at a lower price than they could fairly have got they would clearly

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not have been able to recover their commission. There is nothing of this kind in the present case. But by the special terms of their contract they undertook, in addition to their duty as auctioneers, that if the plaintiff would pay them their out of pocket expenses they would truly account to the plaintiff for those expenses. And it seems to me that it would be wrong to say that because the defendants failed in the performance of their duty properly to account for the out of pocket expenses, therefore they are not to have their commission, although they performed all their duty as auctioneers faithfully.

RIDLEY J. I concur in the judgment of my Lord.

Judgment of county court judge varied accordingly.

Solicitor for appellant: *G. F. Sutton, for Page & Thompson, Bristol.*

Solicitors for respondents: *Guscotte, Wadham & Dawe, for Burges & Sloan, Bristol.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Principal and Agent—Secret Commission—Sub-agent—Privity of Contract—Fiduciary Relation—Money had and received.

Agents, who were employed for commission to procure an advance of money for their principals, employed for that purpose, with the assent of the principals, a sub-agent, on the footing that he should share the commission with them. The sub-agent was aware that the agents were acting in the matter for their principals. He succeeded in procuring the advance of the required amount by a company. Without the knowledge of the agents or their principals, the sub-agent received from the company a commission for introducing the business to them :—

Held, that, on the facts, there was evidence that the contractual relation of principal and agent had been established between the principals and the sub-agent; and, secondly, that, even if no privity of contract existed between them, the sub-agent stood in a fiduciary relation to the principals, and was therefore accountable to them for the commission which he had received from the company.

On a claim in an action, to which the company was not a party, made by the principals against the sub-agent to recover commission received by him as aforesaid, it appeared that by the agreement between the company and the sub-agent further sums by way of commission on the transaction would become payable in the future to the sub-agent by the company :—

Held, that the Court must decline to make any further declaration of right with regard to such sums than that the sub-agent would become indebted in respect of them to the principals when and as he should receive the same.

De Bussche v. *Alt*, (1878) 8 Ch. D. 286, and *Lister & Co.* v. *Stubbs*, (1890) 45 Ch. D. 1, followed.

APPEALS from the judgment of Kennedy J. in an action tried by him without a jury.

The action was brought by the plaintiffs, Powell & Thomas, against the defendants, Evan Jones & Co., to recover the sum of 1400*l.*, payable to the plaintiffs, as commission on debentures to the amount of 70,000*l.* issued through the instrumentality of the Law Guarantee and Trust Society, under an agreement or commission note, dated August 7, 1902, which was in the following terms: "Messrs. Percy Powell

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and H. J. Thomas, Cardiff. In consideration of your introducing to us the Law Guarantee and Trust Society for the purpose of negotiating a debenture issue in connection with a fleet of steamships, and of such negotiations resulting in business, we undertake to pay you a commission of 2 per cent. on the amount that may be mutually agreed between us and the said society to be advanced. Yours faithfully, Evan Jones & Co."

The defendants pleaded by way of defence, in substance, (1.) that no advance had been obtained for them through the instrumentality of the Law Guarantee and Trust Society, and (2.) that a person named Cowperthwaite had been employed by the plaintiffs to obtain the advance required by the defendants, and that the plaintiffs wrongfully allowed Cowperthwaite to receive a commission on the transaction from the Law Guarantee and Trust Society without the knowledge of the defendants, and were in consequence not entitled to claim any commission from the defendants; and the defendants counter-claimed against the plaintiffs and Cowperthwaite, who was joined as a defendant to the counter-claim, the amount of the commission so received by Cowperthwaite.

The facts, so far as material to this report (1), appeared to be as follows. In the spring of 1902 the defendants, Evan Jones & Co., who were shipowners carrying on business at Cardiff, were engaged in the formation of a steamship company, afterwards incorporated under the Companies Acts, and called the Field Line, and were desirous of raising money by placing an issue of debentures by the company to the amount of 70,000*l.*, to be secured on the ships of the company. They applied to the plaintiffs, who also carried on business in Cardiff, to obtain for them the amount of money required on

(1) It has not been thought necessary to set out in detail the facts and the correspondence in this case, which was very lengthy, such details being only material to the question of fact whether a contract of agency had been created as between Cowperthwaite and Evan Jones & Co. As will be seen from the judgments, the Court held that, independently of any such contract, a fiduciary relation existed between them such as to render Cowperthwaite accountable to Evan Jones & Co. for the commission received by him, and it is on that point that the case is reported.

debentures. For this purpose the plaintiffs applied to one Akenhead, and in May, 1902, he introduced the plaintiffs to Cowperthwaite, who had on previous occasions had business transactions with the Law Guarantee and Trust Society. It was arranged between the plaintiffs, Akenhead, and Cowperthwaite, that the latter should endeavour to get the Law Guarantee and Trust Society to provide for the defendants, Evan Jones & Co., the amount which it was desired to raise by the issue of debentures, and that Akenhead and Cowperthwaite should have certain shares of any commission which the plaintiffs might receive from the defendants upon the transaction. Subsequently, on July 16, the plaintiffs introduced Cowperthwaite to the representative of the defendants, Evan Jones & Co., and it was arranged that Cowperthwaite should introduce Evan Jones & Co. to the Law Guarantee and Trust Society. A great amount of correspondence and negotiation afterwards took place directly between the defendants, Evan Jones & Co., and Cowperthwaite, with regard to the carrying out of the transaction with the Law Guarantee and Trust Society. On August 7 the agreement or commission note above referred to was signed by the defendants. Cowperthwaite introduced the defendants, Evan Jones & Co., to the Law Guarantee and Trust Society; and, ultimately, the money required was obtained, and the debentures were issued and placed, through their instrumentality. Without the knowledge of either the plaintiffs or the defendants, Evan Jones & Co., it was arranged between Cowperthwaite and the Law Guarantee and Trust Society that the former should receive from the society in respect of the transaction the commission which he had usually received from them on previous transactions in which he had introduced business to them. He had actually received a sum of 145*l.* in respect of that commission, and it appeared that by agreement with the society he was to be entitled in the future by way of commission to a certain percentage on the annual premiums payable upon a sinking fund policy of insurance which had to be taken out by the Field Line with the Law Guarantee and Trust Society to insure the ultimate payment of the amount of the debentures.

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It did not appear that the Law Guarantee and Trust Society were aware of the relations existing between Cowperthwaite and Evan Jones & Co.

Kennedy J. gave judgment for the plaintiffs on the claim. With regard to the counter-claim, he appeared to have come to the conclusion on the evidence that the effect of what had taken place was that Cowperthwaite had become the agent for the defendants, Evan Jones & Co., in carrying out the transaction with the Law Guarantee and Trust Society; or that at any rate he stood in a fiduciary relation to the defendants, Evan Jones & Co.; and, under these circumstances, it was improper for him to receive commission, without their knowledge, from the Law Guarantee and Trust Society; and therefore the sum already received by him as such commission must be deemed to be money received for the use of the defendants, Evan Jones & Co. He therefore gave judgment against Cowperthwaite on the counter-claim for that sum, and made a declaration, in substance, that, in respect of any further sums which Cowperthwaite might receive by way of such commission from the Law Guarantee and Trust Society, he would become indebted to Evan Jones & Co. for such sums as and when he should receive the same.

The defendants, Evan Jones & Co., had given notice of appeal against the judgment on the claim, but that appeal had been settled. Cowperthwaite appealed against the judgment on the counter-claim, and the defendants, Evan Jones & Co., gave notice of cross-appeal.

Buckmaster, *K.C.*, and *H. M. Sturges*, for Cowperthwaite. Cowperthwaite acted in this transaction as the agent of the plaintiffs, Powell & Thomas. He was merely a sub-agent, and not the agent of Evan Jones & Co., and there was no evidence of any privity of contract between him and them. The evidence shewed that Evan Jones & Co. declined to enter into any agreement rendering them liable to pay commission to Cowperthwaite. It could not therefore be contended that, if Cowperthwaite had not exercised due diligence or regard for the interests of Evan Jones & Co. in carrying out the trans-

action, they would have had a right of action against him, which would be the case if he was their agent. Consequently, whatever the position may be as between Powell & Thomas and Cowperthwaite with regard to the commission received by Cowperthwaite from the Law Guarantee and Trust Society, that commission cannot be considered as having been received by him in the capacity of the agent of Evan Jones & Co., and he is therefore not liable to account for it to them: *Lockwood* v. *Abdy* (1), *New Zealand and Australian Land Co.* v. *Watson.* (2) The doctrine laid down in *De Bussche* v. *Alt* (3) only applies to cases where, from the very nature of the transaction, authority to employ a sub-agent is implied. The present is not such a case.

[They also cited *Morison* v. *Thompson.* (4)]

With regard to the cross-appeal, Evan Jones & Co. are not entitled to any declaration beyond that made by the learned judge. It has been held that money received by an agent by way of secret commission must be treated as money received to his principal's use, and that he is therefore a debtor to his principal in respect thereof; but it has also been held that he cannot be regarded as a trustee of such money for his principal, or as having effected the agreement for commission as such a trustee: *Lister & Co.* v. *Stubbs.* (5)

J. Eldon Bankes, K.C., and *Holman Gregory*, for Evan Jones & Co., were not called upon to argue in support of the judgment as regards the sum already received by Cowperthwaite by way of commission from the Law Guarantee and Trust Society.—The declaration made by the learned judge does not go far enough. It will be ineffectual as regards any sums payable in the future by way of commission to Cowperthwaite; for he will never claim those sums from the Law Guarantee and Trust Society, inasmuch as he would have to hand them over to Evan Jones & Co. It is submitted that there should be a declaration to the effect that Evan Jones & Co. are entitled to any benefit acquired by Cowperthwaite under the

(1) (1845) 14 Sim. 437; 65 R. R. 621.
(2) (1881) 7 Q. B. D. 374.
(3) 8 Ch. D. 286.
(4) (1874) L. R. 9 Q. B. 480.
(5) 45 Ch. D. 1.

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agreement for commission made by him with the Law Guarantee and Trust Society, as having been made by him as their agent, and that they are therefore entitled to have the sums payable under it paid to them as and when they become payable by the society.

[COLLINS M.R. It would appear from what was said by Lindley L.J. in *Lister & Co.* v. *Stubbs* (1) that such an agreement for commission may be void for illegality.]

There could apparently be no question of illegality here, for the Law Guarantee and Trust Society did not know that Cowperthwaite was acting as agent for Evan Jones & Co., and Evan Jones & Co. were guilty of no illegality. It would not be just that the full amount of the premiums, which are presumably swollen by the amount of the commission payable to Cowperthwaite, should continue to be paid, and Evan Jones & Co. should not be able to obtain the benefit of the agreement for commission.

[MATHEW L.J. The Law Guarantee and Trust Society is not a party to this action. If Evan Jones & Co. require any declaration of right as against that society, it would seem that such a right must be established in an action to which the society is a party.]

Evan Jones & Co. ask at any rate for a declaration that they are entitled to the further sums which become payable, if any, or, alternatively, for a declaration merely that Cowperthwaite was their agent when he made the agreement for the commission. It is submitted that they are entitled to some such declaration to protect them against any assignment by Cowperthwaite of the benefit of that agreement.

COLLINS M.R. This is an appeal from the judgment of Kennedy J., and the only question which really now arises is upon the counter-claim of the defendants against Cowperthwaite, who was joined as a defendant to the counter-claim. The question arises in this way. The plaintiffs, Powell & Thomas, were employed by the defendants, Evan Jones & Co., to assist them in finding some person or persons who would

(1) 45 Ch. D. 1.

advance to them a sum of money which they wished to raise on debentures to be secured on certain ships. The plaintiffs stipulated for a commission of 2 per cent. on the transaction. Being, after some inquiries, unable themselves to find any one willing to advance the money, they applied for assistance in the matter to one Akenhead, who subsequently put them into communication with Cowperthwaite; and an arrangement was made that Cowperthwaite should act in the matter, on the footing that he and Akenhead and the plaintiffs should divide any commission which might become payable by the defendants, Evan Jones & Co., in certain shares between them. Cowperthwaite introduced the Law Guarantee and Trust Society to Evan Jones & Co., as being likely to advance the money required, and ultimately was successful in getting the advance made and the debentures issued through them. It appears that Cowperthwaite had on previous occasions received commissions from the Law Guarantee and Trust Society for introducing business to them, and on this occasion they paid him by way of commission a sum of 145*l.*, and agreed to pay him a percentage on certain premiums of insurance, which were to become payable by the terms of the bargain between the Law Guarantee and Trust Society and Evan Jones & Co. This arrangement for the payment of commission was unknown to Evan Jones & Co. The question is whether, under the circumstances, Evan Jones & Co. are entitled to recover from Cowperthwaite the sum of 145*l.* received by him from the Law Guarantee and Trust Society as before mentioned.

We have had an elaborate argument addressed to us by counsel, by which they sought to shew that Evan Jones & Co. were not so entitled, because there was no privity of contract between them and Cowperthwaite. It was urged that he was merely employed by Powell & Thomas as a sub-agent; that is to say, he was acting solely for them as their agent, and not as agent for Evan Jones & Co., and therefore there was no privity of contract between him and Evan Jones & Co. The learned judge appears to have come to the conclusion that in fact there was privity of contract between Evan Jones & Co.

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and Cowperthwaite; but he also seems to have come to the conclusion that, whether there was such privity or not, Cowperthwaite was in a fiduciary position in relation to Evan Jones & Co.; that, inasmuch as he knew that the advance for which he was negotiating at the instance of Powell & Thomas was an advance which they had been employed by Evan Jones & Co. to procure for a commission which he was to share, he stood in a fiduciary relation to the latter, which debarred him from making a private profit for himself out of the transaction without their knowledge or consent. I think that the conclusion of the learned judge was quite right. If it were necessary to establish privity of contract between Evan Jones & Co. and Cowperthwaite, which, in my judgment, is not the case, there appears to me to have been abundant evidence to support the conclusion that Cowperthwaite did occupy the position of agent to Evan Jones & Co., when the negotiations were taking place through him with the Law Guarantee and Trust Society. A considerable amount of discussion and negotiation with regard to the transaction took place directly between Cowperthwaite and Evan Jones & Co.; and it appears to me that there was evidence pointing to the conclusion that, though it was arranged, by assent of all parties, that the 2 per cent. commission was to be paid to Powell & Thomas, the relation of principal and agent was directly created between Evan Jones & Co. and Cowperthwaite. I think that there was evidence to justify a jury, if the action had been tried by a jury, in coming to that conclusion; and, if the case depended on that alone, whether I should myself have drawn that inference or not, I should be very unwilling to differ on a question of fact from the judge who has done so. But, as I have said, the learned judge appears to have held, independently of that conclusion, that, inasmuch as Cowperthwaite knew that Powell & Thomas, in employing him, were acting as agents for Evan Jones & Co., for the purpose of procuring an advance for them, either directly or through an intermediary, he stood in such a fiduciary relation to Evan Jones & Co. as debarred him from acting in a manner contrary to their interests, or putting

himself in the position of having an interest of his own in the matter which might lead him not to obtain from the Law Guarantee and Trust Society the best terms possible for Evan Jones & Co. In these circumstances he was under a personal incapacity to receive any secret reward from the Law Guarantee and Trust Society; and it is clear that, in respect of any money which he received as such a reward, he would be a debtor as for money received for the use of the persons to whom he stood in that fiduciary relation.

But, as regards the cross-appeal, it is in my opinion equally clear that the declaration made by the learned judge was correct; and that, though Cowperthwaite is a debtor to Evan Jones & Co. in respect of any sums actually received by him under the agreement for commission made by him with the Law Guarantee and Trust Society, he is not a trustee of that agreement for Evan Jones & Co.; and therefore he cannot be compelled to enforce it for their benefit. I desire to refer on this subject to some observations of Lindley L.J. in the case of *Lister & Co.* v. *Stubbs* (1), which appear to me to be directly in point in this case. In that case principals sought to follow money received by their agent by way of secret commission into the investments in which it had been invested on the footing that it must be regarded as trust money. Lindley L.J. there said: "The real state of the case as between Lister & Co. and Messrs. Varley and Stubbs is this. Lister & Co., through their agent Stubbs, buy goods of Messrs. Varley at certain prices and pay for them. The ownership of the goods, of course, is in Lister & Co.; the ownership of the money is in Messrs. Varley. Then Messrs. Varley have entered into an arrangement with Stubbs, who ordered the goods of them, to give Stubbs a commission. That is what it comes to. What is the legal position between Messrs. Varley and Stubbs? They owe him the money. He can recover it from them by an action, unless the illegality of the transaction afford them a defence; but the appellants have asked us to go further and to say that Messrs. Varley were Stubbs' agents in getting his commission from Lister &

(1) 45 Ch. D. 1.

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Co. That appears to me to be an entire mistake. The relation between Messrs. Varley and Stubbs is that of debtor and creditor—they pay him. Then comes the question, as between Lister & Co. and Stubbs, whether Stubbs can keep the money he has received without accounting for it? Obviously not. I apprehend that he is liable to account for it the moment that he gets it. It is an obligation to pay and account to Messrs. Lister & Co., with or without interest, as the case may be. I say nothing at all about that. But the relation between them is that of debtor and creditor; it is not that of trustee and cestui que trust. We are asked to hold that it is—which would involve consequences which, I confess, startle me." These observations appear to me to apply to the point raised on the cross-appeal. If Evan Jones & Co. were to be held entitled to a declaration such as they ask for, it would really involve, as it appears to me, that Cowperthwaite was to be regarded as a trustee for them of the agreement which he had made with the society for commission, and they could insist on that agreement being enforced for their benefit: and that again would involve the result that he would be a trustee for them of any sums received by him under it; which is the proposition that appears to be negatived by what was said in *Lister & Co.* v. *Stubbs*. (1) The matter therefore appears to me to stand thus. To any money which may be received by Cowperthwaite, by way of commission in this case from the Law Guarantee and Trust Society, Evan Jones & Co. will be entitled, and to that extent they are entitled to a declaration of title; but that appears to me to be the utmost length to which the declaration to be made can go. Therefore, the result is that both the appeal and cross-appeal must be dismissed.

STIRLING L.J. I am of the same opinion. I think that Kennedy J. was justified in coming to the conclusion that the relation of principal and agent existed between Evan Jones & Co. and Cowperthwaite, and consequently the principle laid down in *De Bussche* v. *Alt* (2) was applicable. I also think

(1) 45 Ch. D. 1. (2) 8 Ch. D. 286.

that it was not really necessary to go so far as this; for it appears to me that, as soon as Cowperthwaite became aware, as in fact he clearly did, that Powell & Thomas, who were applying to him in the matter, were not themselves really principals in the transaction, but were acting as agents for Evan Jones & Co., he became bound to have regard in dealing with the matter to the interests of Evan Jones & Co., who were the real principals. An agent is bound to account for any profit made by him in the matter of his agency at the expense of his principal and without his knowledge, because he cannot retain for his own use money which it is his duty to earn on behalf of his principal and which, when received, he is under obligation to pay over to his principal. The question arises, for whom in this case ought the sum paid by way of commission by the Law Guarantee and Trust Society to Cowperthwaite to be considered to have been earned, and who ought to be considered as really entitled to receive it? It seems to me that Evan Jones & Co., and not the plaintiffs Powell & Thomas, are the persons who ought to be considered as so entitled. Cowperthwaite was dealing with Powell & Thomas in their capacity as agents. They could not, without authority from Evan Jones & Co., their principals, have authorized him to accept a commission from the Law Guarantee and Trust Society. In my judgment, if he had, on the strength of an authority conferred on him by Powell & Thomas, accepted such a commission, it would have been at his own risk; and, if it turned out that Evan Jones & Co. had not in fact conferred such an authority on Powell & Thomas, he would have been accountable to Evan Jones & Co. for the commission he received. No such question can arise here, because Powell & Thomas were as ignorant of the arrangement made by Cowperthwaite for the payment to him of commission by the Law Guarantee and Trust Society as Evan Jones & Co. themselves. In these circumstances I think that Evan Jones & Co. have a right to call on Cowperthwaite to account for the sum which he has received from the Law Guarantee and Trust Society, as being money improperly accepted by him in the course of his employment without their sanction, and which he is under an

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obligation to pay over to them, and not to Powell & Thomas, who had no authority from Evan Jones & Co. to release him from that obligation, or to deal with it in any way. For these reasons I think that the conclusion arrived at by Kennedy J. was correct, and the appeal must be dismissed.

As to the cross-appeal and the application for a further declaration in favour of Evan Jones & Co., I cannot see my way, having regard to the decision of the Court of Appeal in *Lister & Co.* v. *Stubbs* (1), which seems to have been correctly appreciated by Kennedy J., to go beyond the declaration made by the learned judge.

MATHEW L.J. I agree. In my opinion it is established that, in point both of law and equity, Evan Jones & Co. are entitled to recover from Cowperthwaite the sum which he has received by way of commission from the Law Guarantee and Trust Society. The kind of transaction carried out in this case was one which is of frequent occurrence in business. It was argued on the evidence that Cowperthwaite was only a sub-agent of the plaintiffs, Powell & Thomas, and not the agent of Evan Jones & Co. It frequently happens in matters of business of this kind that an agent, who is employed to render services for a principal, finds that he is not in a position to render those services himself, and, with the knowledge of his principal, he applies to another person, who may have greater facilities for carrying the transaction through. I think that the ordinary course of business in such a case as this is that the last-mentioned person takes the position of agent to the principal. It would be difficult in such cases to suppose that the principal would assent to the conduct of the business in which he was interested being transferred to a person who did not in carrying it out undertake the obligations of an agent towards him. As a matter of sound business it would generally be necessary that such should be the relation. In this case Powell & Thomas, not being able themselves to find any one to provide the amount required by Evan Jones & Co., applied to Cowperthwaite in the matter; and it was arranged

(1) 45 Ch. D. 1.

that, if he succeeded in getting the money, he should have a share of their commission. The correspondence shews that Evan Jones & Co. were informed of this arrangement, and assented to it. They were afterwards placed in direct communication with Cowperthwaite; and, subsequently to their introduction to him, he, as it appears to me, took the position of their agent in the matter, and ultimately, as representing them, he got the business carried through with the Law Guarantee and Trust Society. That being so, he became entitled to a share of the commission which was to come out of the pockets of Evan Jones & Co. Cowperthwaite, however, had stipulated with the Law Guarantee and Trust Society for a further commission; and I think it may be taken that, in carrying out the arrangement for the advance required, they charged such an amount as would cover the commission which they had to pay to Cowperthwaite. He would thus be receiving two commissions, both of which would be paid by Evan Jones & Co., a position which he cannot in point of law be allowed to maintain. It is argued that Cowperthwaite was only the sub-agent of Powell & Thomas in the matter; but there seems to me to have been ample evidence in this case to justify the judge in arriving at the conclusion that Cowperthwaite was agent for Evan Jones & Co., and was liable to hand over to them the sum which he had received by way of commission from the Law Guarantee and Trust Society. But, independently of this view of the case, and of any difficulty there might be by reason of the supposed absence of privity of contract between Cowperthwaite and Evan Jones & Co., another view of the case was successfully presented to the learned judge, namely, that it would be inequitable under the circumstances of this case that Cowperthwaite should be allowed to obtain two commissions, both of which would be paid by Evan Jones & Co., and therefore that he was bound to account to them for what he had received from the Law Guarantee and Trust Society. I agree in the alternative view so taken by the learned judge.

With regard to the cross-appeal, in which we are asked to make a further declaration beyond that made by the learned

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judge, I doubt whether such a declaration as is asked for could properly be made; and, even if the Court had jurisdiction, having regard to the fact that the Law Guarantee and Trust Society is not a party to the action, I certainly do not think it would be right for us to make such a declaration.

Appeals dismissed.

Solicitors for plaintiffs: *W. & W. Stocken, for Digby Powell, Newport, Monmouth.*

Solicitors for defendants: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitor for Cowperthwaite: *C. F. Ingram.*

E. L.

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Oct. 28; *Nov.* 18.

HERMANN *v.* CHARLESWORTH.

Contract—Illegality—Marriage Brokage.

An illegal marriage brokage contract is a contract for reward to procure for another in marriage, as husband or wife, a certain specified person.

A contract for reward to introduce another to persons of the opposite sex with a view to matrimony is not illegal, nor is it illegal to contract for reward to procure for another in marriage some person generally as distinguished from a specified person.

APPEAL from the Westminster County Court.

The defendant is the proprietor of a paper known as *The Matrimonial Post and Fashionable Marriage Advertiser.* In the early part of September, 1903, the plaintiff, Miss Hermann, a lady of thirty-three years of age, in consequence of an advertisement she had seen in the defendant's paper, had an interview with the defendant, and entered into an agreement with him that, in consideration of his introducing her to gentlemen with a view to marriage, she would pay him, as a "special client's" fee, the sum of 52*l.*, of which 47*l.* was to be returned to her after the expiry of nine months in the event of no marriage or engagement taking place within that period. On September 8 she paid to him the said sum of 52*l.*, and on the same date

signed a further agreement in the following terms: "In consideration of being introduced to or put in correspondence with a gentleman through the influence of the proprietor of the paper entitled *The Matrimonial Post and Fashionable Marriage Advertiser*, and in the event of a marriage taking place between such gentleman and myself, I hereby agree to pay to the said proprietor the sum of 250*l.* on the date of my said marriage." The defendant introduced her to several gentlemen, and interviewed and wrote to others on her behalf, but no marriage or engagement took place, and in January, 1904, the plaintiff brought her action in the High Court to recover back the 52*l.* as money paid by her as the consideration for a marriage brokage contract. The action was remitted to the county court. The county court judge held that the contract under which the money was paid was a marriage brokage contract, and as such was illegal and void, but that the parties were not in pari delicto, the defendant being the more culpable as having instigated the making of the contract for purposes of profit to himself, and that, as the plaintiff had repudiated the contract before the illegal purpose of procuring an engagement of marriage had been carried into effect, she was entitled to recover the money back.

The defendant appealed.

Lush, K.C., and *Schiller*, for the defendant. This was not an illegal contract; it was not a marriage brokage contract at all. The bargain was simply to advertise for the plaintiff and to give her introductions to suitable persons with a view to matrimony. But even if it was a contract to procure a husband for the plaintiff, it was not open to objection. The old cases in which contracts for procuring marriage for reward were held void were cases in which the contract was not for procuring marriage generally, but for procuring marriage with a named person, and in which the person procuring the marriage was a guardian or confidential servant, or some other person standing in a fiduciary position to the person who was to be procured in marriage. In *Hall* v. *Potter* (1), where a bond

(1) (1695) Show. P. C. 76.

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had been given by one Thomas Thynne, the appellants' testator, to the respondent's husband conditioned for the payment of a sum of money upon the marriage of the said Thynne with Lady Ogle, and the respondent assisted in promoting the marriage which afterwards took place, the House of Lords ordered the bond to be delivered up to be cancelled. It does not appear from the report in what relation the respondent's husband stood to Lady Ogle, nor was any reason given by the House for their decision, but it is to be presumed that they proceeded upon the reasons urged by the appellants in their reply: "that the not vacating such bonds when questioned in a Court of Equity would be of evil example to executors, trustees, guardians, servants, and other people having the care of children." And in *Scribblehill* v. *Brett* (1), where the appellant claimed to be relieved against a certain lease upon the ground that it was obtained by the uncle of the respondent for brokage in procuring the same marriage as in the last-mentioned case, namely, between Thomas Thynne and Lady Ogle, it was contended "that the taking of bonds, or making bargains, as rewards for procuring marriages, though not voidable in strictness of law, had always been declared fraudulent and set aside in Courts of Equity, because such transactions tended to corrupt executors, trustees, guardians, servants, and others having intimacy with persons of quality and fortune, to betray them into unhappy or improvident marriages." The House, without giving any reasons, ordered the lease to be annulled. Secondly, assuming that this was a marriage brokage contract and illegal, the money paid under it cannot be recovered back, for the contract was partly performed by giving the plaintiff introductions and doing work on her behalf: *Kearley* v. *Thomson* (2), following *Taylor* v. *Bowers*. (3)

Compton-Smith, for the plaintiff. The contract under which the money was paid by the plaintiff was a marriage brokage contract and illegal. No distinction can be drawn between a contract to introduce to possible husbands with a view to

(1) (1703) 4 Bro. P. C. 144. (2) (1890) 24 Q. B. D. 742.
(3) (1876) 1 Q. B. D. 291.

marriage and a contract to procure marriage; nor can any valid distinction be drawn between a contract to procure a husband generally and a contract to procure a specific person as husband. All contracts for the procuring of marriage for reward are void. There is nothing in the reports of the cases cited to shew that the House of Lords intended to confine the avoidance of such contracts to the case of contracts by persons standing in a fiduciary position to one of the parties to the marriage. In Story's Equity Jurisprudence, s. 263, it is said: "Be the foundation of the doctrine, however, what it may, it is now firmly established that all such marriage brokage contracts are utterly void, as against public policy." The case of *King* v. *Burr* (1) goes to support the plaintiff's contention. There the defendant, being desirous of marrying some person of fortune, applied to the plaintiff to introduce him to a woman of that description, which the plaintiff agreed to do. The plaintiff accordingly gave a number of entertainments to which he invited the defendant and various women of fortune, the expense of which entertainments the defendant undertook to pay. To a bill of discovery in support of an action to recover the expense of the entertainments the defendant demurred generally, and the demurrer was allowed, Lord Eldon saying that he would not give any assistance in support of such an action. Then if the contract in the present case is void, the money paid under it can be recovered back: *Smith* v. *Bruning*. (2) There was no such part performance of the illegal purpose as to bring the case within the decision in *Kearley* v. *Thomson* (3); to amount to that the defendant must have succeeded in bringing about an actual engagement.

Schiller, in reply. The judgment of Lord Hardwicke in *Cole* v. *Gibson* (4) shews that the objection to marriage brokage contracts exists only where the contract is by persons having influence over one of the parties to the marriage, such as guardians and servants. There was no suggestion of the defendant being in any position of influence here.

Cur. adv. vult.

(1) (1810) 3 Mer. 693.
(2) (1700) 2 Vern. 392.
(3) 24 Q. B. D. 742.
(4) (1750) 1 Ves. Sen. 503.

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Nov. 18. The judgment of the Court (Lord Alverstone C.J., Kennedy and Ridley JJ.) was delivered by

KENNEDY J. The judgment under appeal is based upon the view that the agreement between the plaintiff and the defendant, and in pursuance of which the plaintiff had paid to the defendant the sum of 52*l.*, constituted a marriage brokage contract, and, therefore, was an illegal agreement. The learned county court judge further held that the plaintiff was not in pari delicto, and, having repudiated the agreement before the defendant had performed his part of it, was entitled to recover from him the money which she had paid.

We are of opinion that the transaction was not illegal. It will be found on referring to the authorities which were cited to us by counsel in the course of the argument, and which are collected in the notes to Story's Equity Jurisprudence, 10th ed. ss. 260–264, that the illegal marriage brokage contract is a bargain for pecuniary reward to procure for another in marriage, as husband or wife, a certain specified person. Such an agreement, says Story, s. 261, citing the judgment in *Drury* v. *Hooke* (1), "has been not inaptly called a sort of kidnapping into a state of conjugal servitude." The business here appears to be essentially different. The plaintiff, who was not, it may be noted, an infant, but a lady of thirty-three years of age, sought out the defendant, who is the proprietor of the *Matrimonial Post*, a newspaper devoted to the advertisement of connubial inclinations, and consulted him as to the prospect of her obtaining a husband to her liking through his introduction to her of gentlemen with whose eligibility and desire for matrimony he had become acquainted through their use of the columns of his newspaper. The defendant, no doubt, expressed his conviction that amongst the advertisers to whom he would introduce her she would not fail to find some one who would fall in love with her, and whose person, lineage, and wealth would satisfy her aspirations, especially if the defendant's energies were stimulated by a written promise to pay him 250*l.* upon the celebration of her marriage, and if meanwhile, as a "special client," she paid him a fee of 52*l.*, to be returned to

(1) (1686) 1 Vern. 412.

her by the defendant (except as to 5*l.*) at the end of nine months if no marriage or engagement took place within that period.

Let us go further, and for the moment assume, as the learned county court judge seems, from some facts of his judgment, to have thought, that the defendant was rash enough to undertake, in consideration of the aforesaid promise and fee, that a wedding should result from his introductions. The agreement would still, in our judgment, essentially differ from a marriage brokage contract; for even in this view of the facts there was no undertaking to procure for the plaintiff any particular person as her husband; the only promise on his part was that amongst those whose acquaintance the plaintiff should make through his agency there should be some one with whom the plaintiff would form a matrimonial alliance. However distasteful to most persons may be the search for a spouse amongst persons introduced by a paid advertising agent, and however foolish and reckless the agent may appear to be if he promises a lady that her search shall be successful (and the facts cannot be put more favourably for the plaintiff than this), the transaction is, in our judgment, not one of marriage brokage, and is not really open to the particular suggestions of mischief upon which Story descants so eloquently in the passage to which we have already referred. We are not prepared to extend the application of the doctrine of the illegality of marriage brokage contracts, as it has been established in the reported decisions, to the circumstances of the present case.

The claim of the plaintiff, as appears from the particulars on the writ, has been founded on the alleged illegality of the contract. There never has been any claim to set it aside on the ground of misrepresentation. If therefore, as we have held, the contract was not illegal, the plaintiff's success in this action must depend upon her ability to prove that in the circumstances which have happened she has a good claim by virtue of the agreement itself. This Court is of course not at liberty to disregard, because its own view would have been different, any finding of the learned county court judge upon a

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Kennedy J.

question of fact, if there is any support in the evidence for that finding. It appears to us, however, that here only one conclusion can properly be drawn from the oral testimony and from the documents. The remuneration of the defendant, contingent upon the plaintiff's marriage, was fixed at 250*l.*, and the plaintiff was meanwhile to pay the defendant 52*l.* as a "special client" fee, upon the condition that, unless within nine months a marriage or an engagement resulted from the introductions which the defendant undertook to procure, 47*l.* out of the 52*l.* should be returned to the plaintiff. In other words, the defendant was to have 5*l.* in any event for his exertions, and he was given nine months within which to earn the right to retain the balance by introducing to the plaintiff an acceptable partner.

If the learned county court judge, as some of the language of his judgment appears to indicate, held that the right of the defendant to any portion of the 52*l.* as well as to the 250*l.* depended upon a marriage of the plaintiff resulting from the introductions, we can only say, with great respect, that we are unable to find in the evidence any justification for this conclusion. The arrangement was put quite clearly by the plaintiff in cross-examination: "If I paid 52*l.* he was to introduce me to gentlemen, and if I got married I was to pay, over and above, 250*l.*" The letter of the defendant acknowledging the receipt of the 52*l.* runs thus: "Dear Madam,—I beg to acknowledge the receipt of 52*l.* 47*l.* to be returned in nine months should no engagement or marriage take place within that period." The plaintiff admitted that the defendant had introduced her to various people, that she had received letters from some of the persons whose names appeared in a list, and that she had had a number of interviews at the defendant's office. Amongst the documents produced is some correspondence from the plaintiff herself, in November and December (two or three months after the agreement with the defendant), to two negotiators for the honour of the lady's hand, to one of whom she appears to have sent her photograph. When the plaintiff commenced her present action against the defendant in January, 1904, less than five months out of the stipulated nine had

expired. In our judgment, therefore, the plaintiff's action, so far as relates to 5*l.*, part of the sum of 52*l.*, was in no circumstances maintainable, and as to the balance of 47*l.* was premature, and the defendant is entitled to our judgment on this appeal.

Judgment for the defendant.

Solicitors for plaintiff: *Coburn & Co.*
Solicitor for defendant: *A. F. Harvey.*

J. F. C.

[IN THE COURT OF APPEAL.]

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ELLINGER & CO. AND ANOTHER *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Insurance (Life)—Policy—Warranty against Suicide—Condition precedent—Policy for Benefit of Third Party.

An application for a policy of insurance on the life of the applicant for the benefit of creditors stated that it was the basis and a part of the contract; and the applicant thereby warranted and agreed that he would not commit suicide, whether sane or insane, during the period of one year from the date of the contract. The policy subsequently issued in pursuance of the application stated that it was made in consideration of the application, which was thereby made a part of the contract. The applicant committed suicide within the year while temporarily insane. In an action on the policy:—

Held, affirming the judgment of Bigham J., that the warranty against suicide was a condition of liability, and that the action was therefore not maintainable.

APPEAL from a judgment of Bigham J. (1) in an action tried by him without a jury.

The action was upon a policy of life insurance for 4000*l.* issued by the defendants to one Firnberg.

On May 23, 1902, Firnberg signed an application to the defendants for a policy for 4000*l.* for five years on his own life payable to the plaintiffs, Ellinger & Co., who were creditors of his to that amount.

(1) [1904] 1 K. B. 832.

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The application, so far as material, was as follows:—"This application made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract for insurance. . . . I hereby agree that all the following statements and answers and all those that I make to the company's medical examiner in continuation of this application are by me warranted to be true and are offered to the company as a consideration of the contract which I hereby agree to accept. . . ." Then followed a number of statements beginning with that of the name of the applicant. The ninth statement was as follows: "The full name of the person to whom the insurance is payable is Ellinger & Co., Manchester." The twelfth statement was as follows: "The insurable interest of the said beneficiary in the life proposed for insurance other than that of family relationship is to cover debt." After those statements there followed three clauses in the following words: "I hereby warrant and agree that, during the next two years following the date of issue of the contract of insurance for which application is hereby made, I will not travel or reside in any part of the torrid zone, or north of the parallel of 60° north latitude in the Western Hemisphere, or north of the parallel of 70° north latitude in the Eastern Hemisphere, and will not engage in any of the following extra-hazardous occupations or employments—retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labour, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad, train, or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. I further warrant and agree that I will not engage in any military or naval service in time of war during the continuance of the said contract without first obtaining written permission from the company. I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract."

The policy was issued on May 24, 1902. It commenced with the following words: "In consideration of the application for this policy, which is hereby made a part of this contract, the

Mutual Life Insurance Company of New York promises to pay. . . . unto Ellinger & Co. . . . . creditors of Max Firnberg . . . . their successors or assigns 4000*l*. . . . . upon . . . . proof of the death of the said Max Firnberg, provided such death takes place within the term of five years from the date hereof . . . . upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The half annual premium of 56*l*. 16*s*. 8*d*. shall be paid in advance on the delivery of this policy and thereafter to the company at its principal agency in Great Britain on the 24th day of November and May in every year during the continuance of this contract until premiums for five full years shall have been duly paid to the said company." A number of provisions were printed on the back of the policy, one of which was as follows: "Military and naval service of any kind, the volunteer service of Great Britain and Ireland in time of peace excepted, whether as combatant or non-combatant, without permission in writing, signed by one of the officers of the company, is prohibited under this contract."

In February, 1903, while the policy was still in force, Firnberg committed suicide, while temporarily insane. At the time of his death he owed more than 4000*l*. to the plaintiffs, Ellinger & Co. His executor joined with them as a co-plaintiff in the action, suing as trustee for them.

Bigham J. gave judgment for the defendants. (1)

C. A. Russell, K.C., and *Cababé*, for the plaintiffs. It is contended that the term with regard to suicide in the application is merely a warranty in the proper sense of the term, namely, a collateral promise, and not a condition of liability. If the intention had been to make it a condition, the natural course would have been to make it so in express language. It is important, as bearing upon the intention of the parties, to observe that this policy was to the knowledge of the defendants a policy taken out by a debtor as a security to his creditors. If the policy was to be invalidated by suicide of

(1) [1904] 1 K. B. 832.

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the debtor during temporary insanity, the value of the security would be rendered very precarious. It is a general rule that, if the language of a policy of insurance is ambiguous, it ought to be construed against the company, inasmuch as they are the framers of it. In *Thomson* v. *Weems* (1) Lord Blackburn said that the rule applicable to marine policies, namely, that every statement of fact bearing upon the risk introduced into the policy is to be construed primâ facie as a condition precedent, does not apply to life policies. There is, further, a distinction in this respect between a statement as to an existing fact and an executory promise like that here in question. There is no case to be found in the books where failure to perform a promise de futuro has been held to avoid a policy in the absence of express terms providing that it should do so. The opening words of the application in this case, which make the statements following them the basis and a part of the contract, only apply to the statements of fact which follow. They do not apply to the three executory promises or warranties, amongst which is the stipulation with regard to suicide. One of the printed conditions on the back of the policy itself absolutely prohibits military and naval service, except in the volunteers in time of peace, without the permission of the company. So that by the policy itself that is made a condition, whereas the other two executory promises or warranties are not. Therefore, on the principle expressio unius alterius exclusio, the warranty as to suicide ought not to be construed as a condition.

[They cited *Stoneham* v. *Ocean Railway and General Accident Insurance Co.* (2); *Hambrough* v. *Mutual Life Insurance Company of New York* (3); *Fowkes* v. *Manchester and London Life Assurance Association* (4); *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (5); *Barnard* v. *Faber* (6); *Newcastle Fire Insurance Co.* v. *Macmorran.* (7)]

Haldane, K.C., and *S. A. T. Rowlatt*, for the defendants, were not called upon to argue.

(1) (1884) 9 App. Cas. 671, at p. 684.
(2) (1887) 19 Q. B. D. 237.
(3) (1895) 72 L. T. 140.
(4) (1863) 3 B. & S. 917.
(5) (1873) L. R. 8 Ch. 942.
(6) [1893] 1 Q. B. 340.
(7) (1815) 3 Dow, 255; 15 R. R. 67.

COLLINS M.R. I am of opinion that the judgment of Bigham J. in this case was correct. I really might give judgment by adopting the very terms which he has used; but, in deference to the argument which has been addressed to us, I will make a few observations. The action is brought upon a policy of life insurance. The policy is expressed to be made "in consideration of the application for this policy, which is hereby made a part of this contract." The application begins with the statement that it is "the basis and a part of a proposed contract of insurance." It then proceeds as follows: "I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract which I hereby agree to accept." Therefore, there are in this case statements similar to those which were emphasized in the judgment of Lord Esher M.R. in *Hambrough* v. *Mutual Life Insurance Company of New York.* (1) Then follow certain statements as to the name and residence of the applicant, and a number of other particulars, after which come three clauses, which are expressly made warranties, the same effect having been produced with regard to all the preceding statements by the words at the beginning of the application. The third of these clauses is as follows: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." This last statement is in my opinion, as well as all those statements which precede it, made the basis and part of the contract. The question is whether that statement, which purports to be a warranty, has the effect of a "condition," a sense in which the word "warranty" is often used in relation to contracts of insurance. I think, having regard to the context, that all the three statements or warranties which I have mentioned were intended to constitute conditions of the contract. With reference to the distinction which was drawn by Lord Blackburn in *Thomson* v. *Weems* (2) between policies of marine insurance and policies of life insurance, it is to be

(1) 72 L. T. 140. (2) 9 App. Cas. 671, at p. 684.

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observed that the policy and application in this case contain the very same term which in his opinion made applicable to the life policy in that case the rule that the truth of a statement in a policy material to the risk is a condition of the contract, namely, the term that the statement is to be the basis of the contract. In the passage referred to he said: "In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, primâ facie, at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire: see per Lord Eldon C. in a Scotch appeal on a fire insurance. (1) No question arises on that in the present case, but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies. But I think, when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which, I think, include his statement that he was of temperate habits) is warranted." Lord Blackburn, therefore, appears to have been of opinion that, where there is a statement of fact bearing upon the risk, made in relation to a contract of life insurance in such terms as are used in the present case, it constitutes a condition of the contract. The question is whether the warranty against suicide in this case is a condition. The law with regard to that question appears to me to be laid down in a manner absolutely clear and accurate by Bowen L.J. in *Barnard* v. *Faber*. (2) He there said: "It is, therefore, a term of this policy that there should be this promise; and, if this promise is one which goes to the root of the whole engagement and transaction, then it becomes, according to the ordinary principles of ordinary law, a condition—either a condition precedent, or, if the condition

(1) *Newcastle Fire Insurance Co.* v. *Macmorran*, 3 Dow, 255; 15 R. R. 67.
(2) [1893] 1 Q. B. 340, at p. 343.

is one which cannot be construed as a condition precedent and must be a condition subsequent, then it becomes a condition subsequent. That arises from the materiality of the promise which is assumed to be made, and the making of which is to be a term of the engagement or transaction into which the underwriter has entered. When you have got as far as that, it is clear that it is the term as regards the risk which is material. A term as regards the risk must be a condition." That statement of the law seems to me to be applicable to the present case. I think that the stipulation in question really means that the assurers are not to be at the particular risk of the applicant's committing suicide within the year: and it appears to me to comply with all the requisites of a "condition" as defined by Bowen L.J. I might really have contented myself with repeating what Bigham J. said, by way of summarizing what he had before stated, at the end of his judgment. He said: "What, then, did the parties, Firnberg and the defendant company, intend when they inserted the warranty that Firnberg should not commit suicide? I think it is clear that they intended that in the event of suicide the company should not be liable on the policy. It does not matter whether the clause is called a warranty or not. It constitutes a limitation of the defendants' liability. Death within five years is the event upon the happening of which the defendants are to pay, but death by suicide within the first twelve months is excluded. Apt words have been used to express this intention, and it is, I think, impossible to read the clause as merely giving to the company a cross-claim against the estate of the deceased for damages." That passage seems to me to sum up the whole situation in a manner upon which I really cannot improve. I should perhaps add that I do not think that the fact of this being what is called a creditor's policy makes any difference in this case. For these reasons I think the appeal must be dismissed.

STIRLING L.J. I am of the same opinion, and have very little to add. It seems to me that, although the primary legal meaning of the term "warranty" may, perhaps, not be to import a condition of liability, it is nevertheless frequently used

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in that sense, and therefore may in any case be so used. The question in each case is whether it is so used. In the case of marine policies the word "warranty" appears constantly to be used with reference to a "condition." It was not disputed that, in the case of this very contract, the truth of a number of statements, which precede the stipulation in question, is made a condition precedent to the validity of the contract. It is urged that this is not so with regard to this stipulation. But it appears to me that the fact that the word "warrant" is used in the preceding part of the application as importing a condition affords strong ground for considering at least the possibility of its being so used in this stipulation. That being so, I think that, in order to determine the true meaning, one may well consider the consequences that would ensue from the other construction of the term. I do not think that it can have been the intention of business people, dealing with a matter of this kind, where an insurance company is granting a policy of life insurance on the application of a debtor in favour of a creditor, that the effect of such a stipulation as this should be that the company, in the event of the debtor's committing suicide in the first year, should be bound to pay the policy money to the creditor, and merely have a right of resort to the estate of the debtor for breach of a collateral promise. Such a construction does not appear to me to be reasonable.

MATHEW L.J. I agree. The point appears to me to be a very simple one. The question with which we have to deal is, What did the parties really intend by this clause in the application as to suicide? I have no doubt, speaking for myself, that they meant that suicide of the applicant during the first year should be a peril excepted from the insurance. Some little obscurity may, perhaps, be occasioned by the use of the word "warrant"; but I do not think that is sufficient to affect what appears to me to have been the obvious intention of the parties. The policy is expressed to be made "in consideration of the application for this policy, which is hereby made a part of this contract," and the application states that it is "the basis and a part of a proposed contract for insurance." It seems

to me clear, having regard to those expressions, that the effect of the clause in question is that the death of the applicant by suicide during the first year is a risk not covered by the policy.

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Appeal dismissed.

Solicitors for plaintiffs: *G. Trenam, for Addleshaw, Sons & Co., Manchester.*

Solicitors for defendants: *Freshfields.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1904 *Oct.* 26, 27.

KISTLER *v.* TETTMAR.

Practice—Attachment, Writ of—Disobedience of Order—Personal Service, Absence of—Evasion of Service—Order XLI., *r.* 5.

The rule that requires personal service of an order before a writ of attachment can be issued for disobedience of it is subject to an exception where the order has come to the knowledge of the person sought to be attached and he evades service of it.

Hyde v. *Hyde*, (1888) 13 P. D. 166, followed.

APPEAL from an order made by Phillimore J. at chambers, directing that a writ of attachment should issue against a judgment debtor, and lie in the office for seven days from August 12, and, if by that time the sum of 25*l.* were paid by her to the solicitors for the judgment creditor, it should lie in the office till the seventh day of the next sittings.

Judgment in an action for goods sold had been obtained in default of appearance against the defendant, a married woman, in June of the present year. The judgment creditor obtained on July 15 an order from a master that the judgment debtor should attend before him for the purpose of being examined as to her means of satisfying the judgment. A person named Allen, who was employed by the solicitors for the judgment creditor to serve that order, deposed on affidavit, in substance, that on July 18 he went to the house where the judgment debtor lived, in Eastbourne, in order to serve the order; that

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the door was opened to him by her husband, who said that she was within but could not see the deponent; that the deponent then explained to the husband the nature of his errand, and the serious consequences that might ensue on resisting the order of the Court; that the husband then went within to inform the judgment debtor, and on returning to the door informed the deponent that the judgment debtor could not see him, and would not make any appointment to see him at any other time; that the deponent then handed to the husband a copy of the order and 1*l.* for conduct money, and requested him to hand them to the judgment debtor, but he refused to take them, and the deponent thereupon left them on the door-mat; and that the deponent shewed the husband the original order. The copy order so left at the house where the judgment debtor lived was indorsed with a note of the appointment made by the master for her examination, and with a notice to the judgment debtor that, if she did not obey the order by the time therein limited, she would be liable to process of execution for the purpose of compelling her to obey the same. The judgment debtor did not attend on July 23, the day fixed for her examination, and the master thereupon gave a further appointment for July 26, and directed that notice of the adjourned appointment should be given to the judgment debtor by letter. A letter was accordingly written and posted to the judgment debtor by the judgment creditor's solicitors informing her that they were in a position to apply to the judge for her attachment and imprisonment for contempt of Court, but that they did not wish to take harsh measures against her, and had therefore procured another appointment for July 26. On that date the clerk to a solicitor appeared before the master as representing the judgment debtor, and stated that she was too unwell to attend, but suggested that she might be examined at her residence at Eastbourne. The master refused to accept the statement that the judgment debtor was too ill to attend unless confirmed by the affidavit of a medical man, and again adjourned the matter till August 2. On July 28 the solicitor acting for the judgment debtor wrote to the solicitors for the judgment creditor a letter to the following effect: he informed

them that, at the request of the judgment debtor's husband, he had instructed his clerk to attend on July 26 and to explain to the master that the judgment debtor was incapable of making a journey to London, and that his clerk, on seeing the order for examination of the judgment debtor, found that the note indorsed thereon only stated that service was effected by leaving a copy of it with a man at the house, which was no service on the judgment debtor; he then went on to suggest that, if they wished to have the judgment debtor examined, they ought not to object to her being examined at Eastbourne, the rules of Court providing for this in the case of illness, and stated that his clerk had made this suggestion before the master, but that the judgment creditor's solicitors had declined the same, and insisted on an affidavit being made by a medical man; and that under the circumstances he did not see why his client should be put to this expense until they had complied with the rules as to service. On August 2 the judgment debtor did not attend before the master, and no one appeared to represent her. Upon August 9 the judgment creditor obtained from Phillimore J. at chambers an order that a writ of attachment should issue against the judgment debtor for non-compliance with the order for her examination, the writ to lie in the office for seven days, and not to be executed, if the judgment debtor attended an appointment before the master before the Vacation. A fresh appointment for her attendance was obtained for August 12. On that date an application was made on behalf of the judgment debtor to Phillimore J. to vary his former order upon affidavits sworn on August 11 by a medical man and the judgment debtor's husband. The affidavit of the medical man stated, in substance, that he was then attending the judgment debtor, that she was suffering from a weak heart and nervous exhaustion occasioning loss of functional control, and was unfit to make the journey to London or submit to the proposed examination, and that, in the event of her attempting to comply with the order for her examination on August 12, he could take no responsibility for the consequences, which in his opinion were likely to be of a most serious nature, perhaps

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causing permanent mental disturbance. The affidavit of the husband, in substance, stated that, when the before-mentioned Allen called, he informed him that the judgment debtor could not see him as she was too unwell to see anybody; that Allen then said that he wished to serve her with an order for her examination before one of the masters of the Supreme Court, and the deponent again told him that it was impossible for him to see the judgment debtor on account of her extreme ill-health: that Allen then produced a document and a sovereign, and asked the deponent to hand the same to the judgment debtor, but the deponent informed him that he could not on any account comply with his request, as to mention or discuss matters of business with the judgment debtor would have serious results; and that Allen then left the document and the sovereign on the door-mat. The deponent further denied that at any time he went within, and mentioned the matter to the judgment debtor, and then returned and informed Allen that the judgment debtor would not see him and would make no appointment to see him at another time; and that, having been instructed by the medical man in attendance on the judgment debtor to keep all matters of business from her, he came to the conclusion that the only course was to forward the document and the sovereign to her solicitor, which he did some few days afterwards together with the letter addressed to the judgment debtor by the judgment creditor's solicitors giving notice of an appointment. Upon hearing the application to vary his former order Phillimore J. made the before-mentioned order, against which the judgment debtor now appealed. It was not denied by the counsel for the judgment debtor that she had had notice of the order for her examination.

Oct. 26. *Frank Mellor*, for the judgment debtor. The terms of Order XLI., r. 5, require personal service of an order before a writ of attachment can be issued for disobedience of it: *In re Cunningham.* (1) There is no authority which shews that knowledge of the order on the part of the person sought

(1) (1886) 55 L. T. 766.

to be attached is sufficient in the absence of personal service. Possibly an order for substituted service might have been obtained under Order LXVII., r. 6, but that course was not pursued. [He cited *Taylor* v. *Roe* (1); Order XLII., r. 32; Order XLIV., r. 2.]

Llewelyn Davies, for the judgment creditor. Order XLI., r. 5, does not provide that the service of the order in such a case as this must be personal. It is enough if the Court is satisfied that the order has come to the knowledge of the person sought to be attached, and that she evades service. [He cited *Allen* v. *Allen*. (2)]

Frank Mellor, in reply, cited *Mander* v. *Falcke*. (3)

Cur. adv. vult.

Oct. 27. STIRLING L.J. This is an appeal from an order made by Phillimore J. in August last by which he ordered that a writ of attachment should issue against a judgment debtor, but should lie in the office for seven days, and, if by that time a sum of 25*l.* were paid, should continue to lie in the office until the seventh day of the present sittings. The case is a somewhat singular one. I understand that the ground upon which the learned judge proceeded in making the order for the issue of the writ of attachment was that the judgment debtor was evading service of the order for her examination, and that, in those circumstances, the objection that the order had not been personally served ought not to avail her. The question is whether the learned judge was right in the conclusion at which he arrived. In my opinion he was. In the first place I think he was right in his view of the law. The latest case on the subject appears to be *Hyde* v. *Hyde* (4) in the Court of Appeal. That case related to a writ of sequestration, and a similar objection to that taken in the present case was raised. Cotton L.J. stated the law thus: "It is true that as a general rule no order will be made for sequestration or attachment

(1) (1893) 68 L. T. 213.
(2) (1885) 10 P. D. 187.
(3) [1891] 3 Ch. 488.
(4) 13 P. D. 166.

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unless it can be shewn that there has been personal service of the order disobeyed, but there are exceptions to that rule. If it were proved, for instance, that the person was actually in Court at the time the order was made, service would be unnecessary in order to obtain process for contempt, and personal service is also dispensed with if it is shewn that the reason why there has been no personal service is that the person to be served has evaded service." That case was one of sequestration, but the learned Lord Justice laid down that law as equally applicable to attachment, and I have no doubt with perfect accuracy, because the general rule always has been that a writ of sequestration cannot be issued unless the party applying for it is in a position to obtain a writ of attachment. This being the law, the only remaining question to be considered is one of fact, namely, whether the judge was right in coming to the conclusion that the judgment debtor was evading service of the order. It seems to me that he was. It may be that, instead of leaving the copy order with the husband of the judgment debtor, as the process-server did, the better course would have been to apply for an order for substituted service, which might in my opinion have been made under Order LXVII., r. 6; but, however that may be, the question is whether the case is not brought within the exception mentioned by Cotton L.J. There is a conflict to a certain extent as to what passed between the process-server and the husband on July 18; but what appears to have impressed the learned judge, and what also impresses me greatly, is that in the two affidavits of the doctor and the husband, which were sworn at the last moment on August 11, with the view of getting the learned judge to vary his order of August 9, it is sworn that on August 11 the judgment debtor was not in a state of health which would admit of her complying with the order, but it is nowhere sworn that that state of things existed on July 18. The husband, when he states what took place between himself and Allen, who attended to serve the order, swears that he then told Allen that the judgment debtor was too ill to see him, but he nowhere says that in point of fact that was so.

The other deponent, the medical man, carefully confines all his statements to the state of the judgment debtor's health at the time of making his affidavit and the impossibility of her attendance on August 12, and he does not state that at the date of the original appointment for her examination, which was nearly three weeks earlier, she was not in such a condition as to permit of her attending to be examined. Regard being had to all the circumstances of the case, it appears to me that the correct conclusion is that the judgment debtor was evading service of the order, and, that being so, we ought not to interfere with the order of the learned judge. On these grounds I think the appeal should be dismissed.

MATHEW L.J. I am of the same opinion. It was argued for the judgment debtor that the rule requiring personal service of an order, before a writ of attachment can be issued for disobedience of it, admitted of no exception; and consequently that in this case no writ of attachment could issue even although the judgment debtor was well aware of the existence of the order, and was evading the service of it. This is a somewhat startling proposition, for, after all, the only object of the rule requiring personal service is that the party should know what the order was and the consequences of disobeying it. I do not think that there is any authority for this proposition, which would lead to a manifest absurdity, namely, that the Court would be rendered powerless to enforce its order if the person against whom the order was made chose to lock himself up, and so prevent personal service upon him. My brother Stirling has referred to an authority which establishes that there is no such absolute rule as is contended for; and that the general rule that there must be personal service is subject to an exception, and, where the existence of the order has been brought to the knowledge of a person who is evading personal service in the usual way, the Court can enforce its order by attachment. There remains behind another question, namely, whether, if there were any doubt about the sufficiency of the service, there is not in this case strong evidence of a waiver of personal service. On that ground also I think that

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the appeal of the judgment debtor would have failed, but I entirely concur in the judgment of my brother Stirling.

Appeal dismissed. (1)

Solicitors for judgment creditor: *Hunt & Capron, for Hunt & Hunt, Romford.*

Solicitor for judgment debtor: *W. Hubert Smith.*

E. L.

C. A. 1904 *June 22.*

[IN THE COURT OF APPEAL.]

ABRAHAMS & CO. *v.* DUNLOP PNEUMATIC TYRE COMPANY AND OTHERS.

Practice—Action by Partners—Writ in Name of Firm—Disclosure of Partners' Names—Affidavit—Cross-examination on Affidavit—Partners when Cause of Action accrued—Issue whether particular Person was Partner—Jurisdiction to direct Issue—Order XLVIII.*a*, *rr.* 1, 2.

Where an action is brought by partners in the name of their firm, and the names of the persons constituting the firm are disclosed under the provisions of Order XLVIII.*a*, rr. 1, 2, there is no jurisdiction to direct a cross-examination on an affidavit disclosing the names, or to order a separate issue to determine the question whether a person whose name has been disclosed was a partner at the time of the accruing of the cause of action.

APPEAL of the plaintiffs from an order of Bruce J. at chambers.

The action was commenced by writ, issued in the name of H. Abrahams & Co., to recover damages for breach of an agreement. The defendants, other than the Dunlop Pneumatic Tyre Company, were Components, Limited, and a notice in writing was served on their behalf upon the plaintiffs' solicitor under Order XLVIII.*a*, r. 2, requiring him to declare in writing the names and places of residence of all persons constituting the

(1) The writ was ordered to lie in the office for a further seven days, and until the date of a fresh appointment for the examination of the judgment debtor to be made by the master.

firm on whose behalf the action was brought. The plaintiffs' solicitor replied that the firm consisted of William Emanuel Abrahams, trading as H. Abrahams & Co. Upon a further summons taken out on behalf of Components, Limited, a master made an order that the plaintiffs should furnish on oath a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action co-partners in the plaintiff firm, and the names and places of residence of all the persons constituting the firm on whose behalf the action was brought. Thereupon an affidavit was sworn by Mrs. Louisa Abrahams to the effect that the partners in the firm were William Emanuel Abrahams, temporarily resident in Australia, and herself, and she gave her own address. In the meanwhile a summons was pending, taken out on behalf of Components, Limited, that the writ, issue, and service thereof should be set aside on the ground of irregularity and non-compliance with the rules of Court; and upon that summons coming before a master, he made an order that Mrs. Louisa Abrahams should attend to be cross-examined on her affidavit. From this order the plaintiffs appealed to the judge in chambers, who dismissed the appeal. Mrs. Louisa Abrahams accordingly attended before the master for examination, and the master came to the conclusion that she was not a partner. Subsequently the summons to set aside the writ for irregularity came again before the master, who made an order setting aside the writ, issue, and service thereof. From this order the plaintiffs appealed, and the learned judge made the following order: "If the plaintiffs pay 50*l.* into court within five days as security for costs of issue, issue directed to be tried before a judge alone. If that sum not paid in appeal dismissed. . . . Issue to include both defendants. Plaintiffs in this action to be plaintiffs in issue, and both defendants to be defendants. Question as to whether Louisa Abrahams was at the time of the accruing of the cause of action a partner in the firm of H. Abrahams & Co." Leave to appeal was refused, but on an application to the Court of Appeal leave to appeal was granted.

The plaintiffs appealed.

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Montague Lush, K.C., and *Abinger*, for the plaintiffs. The order of the master setting aside the writ was varied by the order of the judge directing an issue, but there was no jurisdiction to make the orders in either case. Order XLVIII.*a*, r. 2, was applicable to this case, and under that rule the defendants obtained the information which the rule says that the plaintiffs or their solicitors may be asked to supply. The rule provides that "when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as plaintiffs in the writ. But all the proceedings shall, nevertheless, continue in the name of the firm." The rules 1 and 2 of the order are apparently somewhat contradictory, but a possible explanation may be that rule 1 applies to information required as to plaintiffs or defendants, and rule 2 to plaintiffs only; so that defendants have an option as to which rule they will proceed under. The defendants ultimately obtained the information that they required, and it is open to them to raise the defence that any person who is alleged to be a partner, and who is in the same position as if he had been named as plaintiff in the writ, has no cause of action; but that is not a matter that can be separated from the other issues in the case and tried as a preliminary issue.

Schiller (*Hugo Young, K.C.*, with him), for Components, Limited. The learned judge had jurisdiction to make the order. The information sought is the same whether the application is made under rule 1 or rule 2 of Order XLVIII.*a*, and it may be required to be verified by oath or otherwise. The defendants were not tied down to rule 2, but could avail themselves of rule 1 and require the information to be verified, and one way in which this can be done is by means of an issue to determine whether it was true or not. The information was given by affidavit upon summons, and Order XXXVIII., r. 1, says that "Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making the affidavit." This order is of universal application, and gave the master

jurisdiction to determine the matter dealt with in the affidavit, and the judge had jurisdiction to vary that order by directing an issue.

C. W. Lilley (*A. H. Spokes* with him), for the Dunlop Company.

STIRLING L.J. With the greatest respect for the learned judge, the order made does not seem to me to be appropriate to the circumstances of this case. It appears that there had been litigation between H. Abrahams & Co. and the defendants which ended in an agreement of compromise to which the plaintiffs and both the defendants were parties. This action is brought to enforce that agreement. A question arose in this action as to who were the persons composing the firm of H. Abrahams & Co. Rules 1 and 2 of Order XLVIII.*a* shew how that is to be ascertained. Rule 1 appears on the face of it to be applicable to both plaintiffs and defendants. It provides that "any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in any such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct." Rule 2 provides that, "When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by and on behalf of any defendant, forthwith declare in writing the names and places of residence of all persons constituting the firm on whose behalf the action is brought. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects

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shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm." It is perhaps not altogether easy to reconcile the two rules, but rule 2 is applicable to the case only of plaintiffs, whereas rule 1 applies generally. At first in this case the procedure pointed out in rule 2 was followed, and the plaintiffs' solicitors were required to state who were the persons constituting the firm. They replied that it consisted of one person only—W. E. Abrahams. Then a second step appears to have been taken by application to the master that the names and addresses of the persons who were partners when the cause of action accrued should be verified by affidavit under rule 1. Whether that was a proper course to be taken or not, the requirements of rule 1 were complied with, and a lady—Mrs. Louisa Abrahams—came forward and deposed in an affidavit that the partners were two—herself and W. E. Abrahams. Application was thereupon made to a master to set aside the writ as irregularly issued. If that had been done in the first instance it would, I think, have been a proper course to take, but on the hearing of that application it was open to the plaintiffs to shew that a mistake had been made by their solicitor, and that in reality the firm consisted of two or more persons, and it was open to the Court or a judge to allow the action to proceed. It seems to me that the original mistake made by the plaintiffs' solicitors was set right by the affidavit of Louisa Abrahams. The lady came before the master, and on her cross-examination he came to the conclusion that she was not a partner, and made an order setting aside the writ. The plaintiffs appealed, and the learned judge varied the order of the master by directing that if the plaintiff paid a sum of money into court as security for costs an issue should be tried, the question in the issue being whether Louisa Abrahams was, at the time of the accruing of the cause of action, a partner in the firm of H. Abrahams & Co. From that order the plaintiffs appeal. The question is whether there was jurisdiction to direct such an issue to be tried independently of the rest of the action, and it seems to me that the order was not rightly made. This case came within rule 2 of the order, and it must

be treated as if the solicitors had now declared that there were two partners in the plaintiff firm. The order says that, "when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ." Therefore, thenceforth, the action was one by W. E. Abrahams and Louisa Abrahams as plaintiffs against the two defendants, and when a statement of claim is delivered it must be read as containing an allegation that the persons who constitute the plaintiff firm are the two persons who have been declared to be partners in that firm. That will be a necessary part of the cause of action which they will have to establish, and if they fail in so doing the action will fail. I see no ground for severing that issue from the other issues in the action. All the issues ought to be tried together, and there should not be an independent trial of an issue to determine who are the partners in the plaintiff firm. The only result, so far as I can see, of the order for the trial of an independent issue apart from the other issues in the case would be that additional costs would be incurred. I may add that, if the order of the master to stay the action had taken effect, there was nothing to prevent the issue of a fresh writ naming as the plaintiffs W. E. Abrahams and Louisa Abrahams trading as H. Abrahams & Co., and the defendants would have been in the same position as that in which they now are.

I think that the order of the learned judge was misconceived and should be set aside, and that the appeal should be allowed.

MATHEW L.J. I am of the same opinion. Rule 2 of Order XLVIII.*a* is an old rule, to be found, though not in identical words, in the Common Law Procedure Act, 1852, s. 7. It enables a defendant to obtain disclosure of the names of the partners in a plaintiff firm by a statement in writing by the plaintiffs or their solicitors. There is no provision with regard to any application to cross-examine on a statement so obtained, and the defendant is bound to accept it. That rule appears to have been thought to be insufficient standing alone, and rule 1, which applies to firms carrying on business

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within the jurisdiction, was framed to supply the deficiency. Under that rule the information may be verified on oath or otherwise as the judge may direct. It has been argued that the rule gives a general power as to the mode of verification; but there is no indication of an intention to allow a preliminary issue to try the question as to who were in fact the partners. It is said that matter is provided for by Order XXXVIII., r. 1, which it is suggested is of universal application. That rule provides that, "upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit." That applies only to a question of fact which the Court or a judge has at the time jurisdiction to decide, and not to a question to be tried in the action. The question under which this appeal arises relates to an issue in the action which must be tried in the action with the other issues, and is not a matter that can be determined at chambers. I think that the orders of the master and the judge cannot stand, and that the appeal must be allowed.

Appeal allowed.

Solicitor for plaintiffs: *T. W. Browne.*
Solicitors for Dunlop Company: *John B. & F. Purchase.*
Solicitor for Components, Limited: *Alan F. Harvey.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
Nov. 10.

EVANS *v.* COOK.
LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE COMPANY, LIMITED (THIRD PARTIES).

Employer and Workman—Accident—Compensation — Workman in Employment of Sub-contractor—Agreement between Undertaker and Workman—Liability of Sub-contractor to indemnify Undertaker — Right to bring Action in High Court—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 3; *s.* 4.

A workman in the employment of a sub-contractor sustained a personal injury by accident under circumstances that entitled him to compensation under the Workmen's Compensation Act, 1897. The undertaker who had contracted to do the whole of the work agreed to pay to the workman during incapacity one-half of his average weekly earnings, and made payments accordingly. In an action brought by the undertaker to recover from the sub-contractor the amount so paid:—

Held, affirming the judgment of Wills J., that there was nothing in the Act which affected the right of the plaintiff to bring the action in the High Court.

APPEALS from two judgments of Wills J. at the trial of the action without a jury.

The plaintiff contracted to build a workhouse infirmary at Nottingham, and the defendant entered into a sub-contract to execute the whole of the plastering required for the building. A workman named Fraime was in the employment of the defendant, and while engaged on the plastering work he sustained a personal injury by accident that entitled him to compensation under the Workmen's Compensation Act, 1897, but would not have rendered any one liable independently of the Act. Notice of the accident was at once given to the plaintiff and to the defendant, and the former entered into an agreement with the workman to pay to him during incapacity the weekly sum of 15*s.* 9*d.*, being one-half of his average weekly earnings in the defendant's employment. Some time after this agreement was made the case of *Cooper &*

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Crane v. *Wright* (1) decided that a sub-contractor might be liable as an undertaker independently of s. 4 of the Workmen's Compensation Act, 1897, so as to give the principal contractor a right of indemnity under s. 4. Thereupon the plaintiff wrote to the defendant demanding payment of the sums which the plaintiff had paid to the workman. This action was brought to enforce that demand, and in it the plaintiff claimed to be repaid the sums already paid to the workman, and a declaration that the defendant was liable to pay to the plaintiff such further sum as he might have to pay to the workman. The defendant had entered into a policy of insurance with the Lancashire and Yorkshire Accident Insurance Company, and they were brought in as third parties to the action.

The learned judge gave judgment for the plaintiff against the defendant with the declaration asked for. He then proceeded with the case of the defendant against the insurance company, and gave judgment for the defendant for the sum for which judgment had been entered against him, with a declaration that from the date of the writ to the time of giving judgment 15*s.* 9*d.* a week was the amount of the indemnity, and that from the time of the judgment the indemnity must be in respect of such compensation as the plaintiff was liable to pay to the workman.

The third parties appealed, and at their request the defendant also served a notice of appeal as to the judgment against him.

Hugo Young, K.C. (*J. D. Crawford* with him), for the third parties. The plaintiff is not entitled to enforce his claim against the defendant by action in the High Court. The scheme of the Act is that all claims arising under it should be decided by arbitration. By this action in the High Court the defendant is deprived of the benefit of the less expensive proceedings contemplated by the Act, and that affects the third parties under their indemnity. Sect. 1, sub-s. 3, provides that if any question arises in any proceedings under the Act

(1) [1902] A. C. 302.

as to the liability to pay compensation, or as to the amount or duration of compensation, the question, if not settled by agreement, must be settled by arbitration in accordance with the Act. "Liability to pay compensation" includes the case of a claim for indemnity under s. 4 of the Act. In *Cooper & Crane* v. *Wright* (1) the House of Lords decided that a sub-contractor might be an undertaker; so that the defendant in this case might be liable to indemnify the plaintiff. Proceedings to enforce that indemnity ought, therefore, to be taken by arbitration under the Act. Rules 19, 20, and 23 of the Workmen's Compensation Rules, 1898, support this view. Clause 12 of the First Schedule to the Act allows the review of a weekly payment by arbitration under the Act. If such an action as this can be maintained in the High Court, the assessment by a jury of the amount payable by the sub-contractor could be reviewed by an arbitrator. That cannot have been the intention of the Legislature. The intention evidently was that all questions of liability to pay compensation, however they arise, should be determined by arbitration in order to avoid the expense following on proceedings in the High Court. [He cited also *Crossfield & Sons* v. *Tanian*. (2)]

W. Wills and *T. T. Blyth*, for the defendant, and

Stanger, *K.C.*, and *McCardie*, for the plaintiff, were not called on.

COLLINS M.R. In my opinion the appeal of the third parties to this action fails.

A great deal of ingenuity has been shewn in an endeavour to find in the Act something which does not appear to me to be there. Under s. 4 of the Act, when in an employment to which the Act applies a workman has sustained an injury, he may proceed against the undertakers, although his immediate employer is a sub-contractor, and a right of indemnity is given to the undertakers against any other person who would have been liable independently of the section. The workman in this case took steps to recover compensation from the plaintiff who was the undertaker, instead of taking steps against the

(1) [1902] A. C. 302. (2) [1900] 2 Q. B. 629.

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defendant who was his employer, and came to an agreement with the plaintiff for compensation in the shape of a weekly payment at the rate of half the workman's average weekly earnings. That agreement was arrived at independently of the defendant. At that time it was not clear that there was a right of indemnity in such a case against the sub-contractor, and no steps were taken by the plaintiff to claim indemnity from the defendant. Afterwards, as the result of the decision of the House of Lords in *Cooper & Crane* v. *Wright* (1), it was established that the defendant, as sub-contractor, might be liable to indemnify the plaintiff, and steps were taken to enforce that liability by this action in the High Court tried before Wills J., in which the insurance company were brought in as third parties, upon the ground that they were liable to indemnify the defendant under a policy of insurance. The whole of the questions as to the rights of the parties were discussed before the learned judge, who arrived at a conclusion as to the indemnity to which the plaintiff had a right. He then considered the case of the defendant against the third parties, and held that they were liable to indemnify the defendant to the extent to which he was liable to the plaintiff. They come here to complain of this result upon the ground that it was not competent for an undertaker who, by agreement or otherwise, had come under an obligation to pay compensation to a workman, under such circumstances as existed in this case, to put in suit his right to an indemnity from any person who would have been liable independently of s. 4 of the Act, except in accordance with the procedure provided by s. 1, sub-s. 3, of the Act. The onus of establishing this proposition rests upon the person who asserts it; and in my opinion the insurance company, who set up that view, have not got within measurable distance of finding in the Act any inhibition of proceedings in the High Court. The provisions of the Act shew that the scheme of the Act for the assessment of compensation to an injured workman was, where no agreement is arrived at, by means of an arbitration. There is in the Act no provision whereby the rights of the undertaker

(1) [1902] A. C. 302.

against a person liable over to him must be enforced by arbitration, and cannot be determined in the High Court. The obvious reason for providing that a claim by a workman should be settled by arbitration, if no agreement is come to, is the consideration of expense. That reason no longer applies when what is being dealt with is not the claim of a workman, but a claim which arises after the claim of the workman has been determined, and in which the parties concerned might be and probably would be in a good position. There is no à priori reason why the right to an indemnity from a third person should not be determined in the High Court, and in the wording of the Act I can find nothing to bear out the contrary contention. The provision mainly relied on was that in s. 1, sub-s. 3, which enacts: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule of this Act, be settled by arbitration, in accordance with the Second Schedule to this Act." That necessitates reference to sub-s. 1 of the same section to see what is meant by the opening words of sub-s. 3. The meaning is made apparent by sub-s. 1, which makes an employer "liable to pay compensation in accordance with the First Schedule to this Act" to a workman who has been injured. Sub-s. 3, therefore, deals with the compensation to be paid to a workman, that is the direct obligation to pay compensation arising between employer and employed. Then s. 4 was referred to, which creates the liability on which this case arises, but contains nothing to shew that such a liability is to be enforced by arbitration.

Various rules in the Workmen's Compensation Rules, 1898, have also been relied on, but they carry the case no further. Rule 19 deals with proceedings in arbitration taken by a workman, and provides for notice by a respondent who claims indemnity to the person from whom he claims it; and rule 20 provides for the appearance of the person against whom

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indemnity is claimed, and, in default, that he is to be deemed to admit the validity of the award. Those rules have no application to the present case, in which there has been no arbitration.

It would require an express enactment to take away the right of the plaintiff to follow out his remedy in the Court which he selects, and I can find nothing in the Act to restrict that right, nor can I find anything from which a restriction can be implied.

The appeal of the insurance company fails, and the appeal, at their instance, of the defendant must also be dismissed.

STIRLING L.J. I am of the same opinion. The plaintiff was in the position of an undertaker within the meaning of s. 4 of the Workmen's Compensation Act, 1897, and the defendant was a sub-contractor for a portion of the work which the plaintiff had contracted for. While the work was being carried on a workman in the employment of the defendant met with an accident, and applied to the plaintiff, as he had a right to do under s. 4, for compensation for the injury that he had sustained. The amount of the compensation to be paid was agreed between the plaintiff and the workman, and the plaintiff claims in this action an indemnity from the defendant in respect of the sums paid, or hereafter to be paid, to the workman under the agreement. The right to an indemnity is expressly conferred by this section, as the defendant is a person who would have been liable independently of the section. There is nothing in the section saying how the right is to be enforced, and therefore, unless something can be found in the Act to the contrary, the plaintiff would be entitled to sue in the High Court. The clause of the Act principally relied on as excluding the right to sue in the High Court is s. 1, sub-s. 3. It is said that a question has arisen as to the liability to pay compensation, and that this must be settled by arbitration in accordance with the provisions of the Act, but no such question has arisen between the workman and the undertaker, the plaintiff. As between them the question of amount has been settled by agreement. It is said that that agreement is not

such an agreement as is referred to in the sub-section in the words "if not settled by agreement," because that expression contemplates an agreement binding, not only on the workman and the employer, but on any other person liable to indemnify the employer. All I can say is that I do not find that in the Act. It would be hard on the workman if we were obliged to hold that he could not make an agreement with the undertaker, from whom he was claiming compensation, without getting his employer's sanction. It seems to me that there is no hardship on the employer, for he has a remedy under clause 12 of the First Schedule to the Act, under which a weekly payment can be reviewed at the request either of the employer or the workman, and thus the amount of indemnity payable can be ascertained. The judgment of the learned judge in this case was framed upon that view of the Act, for his order dealt with the amount due up to the time of the judgment, but as to the extent of future liability contained a declaration which makes that liability depend on the amount that the plaintiff may be called on to pay. That leaves the defendant at liberty to make application to review the weekly payment, and if he does so successfully his future liability will be as then settled.

MATHEW L.J. I am of the same opinion. It is clear that the compensation dealt with in s. 1, sub-s. 3, of the Act is the compensation payable to the workman, and does not relate to a claim which arises upon an indemnity. In this particular case the plaintiff was under a liability to compensate the workman, and the amount would be arrived at by one of the methods indicated in the Act. It was arrived at by an agreement between the plaintiff and the workman, and when it was determined the provisions of s. 4 came into operation giving the plaintiff a right to an indemnity from the defendant. There is nothing in the Act that obliges the person claiming an indemnity to have recourse in enforcing it to the procedure laid down in the Act for another purpose. He has therefore the right to enforce it in the ordinary way in which a contract of indemnity can be enforced. To hold otherwise would be to make a

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remarkable addition to the words of the Act, and there is nothing to justify such a course. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Wynne, Baxter & Keeble.*

Solicitors for defendant: *Field, Roscoe & Co., for Dowson & Wright, Nottingham.*

Solicitors for third parties: *Pritchard, Englefield & Co.*

A. M.

C. A. 1904 *Oct.* 28.

[IN THE COURT OF APPEAL.]

MILLARD, APPELLANT *v.* BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL, RESPONDENTS.

Local Government — Streets — Paving Expenses, Liability for — Owner of Premises when Works are completed — Change of Ownership before Apportionment and Demand of Expenses — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

Notice was given by a local authority to the owners of premises in a street, requiring them to execute works, under s. 150 of the Public Health Act, 1875, and, the owners not complying with the notice, the works were executed by the local authority. Subsequently, the expenses of the work were duly apportioned, and the proportionate sums due from the owners respectively were demanded. One of the owners to whom the notice had been given sold his premises after the completion of the work, but before the apportionment of the expenses and the demand of the sum apportioned in respect of the premises:—

Held, that he was liable to pay that sum under s. 257 of the Public Health Act, 1875, as having been the owner of the premises when the works were completed.

Dictum in *Reg.* v. *Swindon Local Board*, (1879) 4 Q. B. D. 305, disapproved of.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Wills J., and Kennedy J.) upon a case stated by justices of the West Riding of Yorkshire on proceedings taken before them by the respondents to recover from the appellant a sum of 45*l.* for street expenses.

Carr Hill was a street within the respondents' district, not

being a highway repairable by the inhabitants at large, and on and before June 8, 1899, it was not sewered and paved to the satisfaction of the respondents. On June 8, 1899, the respondents served notice on all the owners (including the appellant) of premises fronting such parts of Carr Hill as required to be paved, requiring them to have the work done. The notices were not complied with, and the respondents executed the works, which were completed on December 4, 1901, on which date the appellant was still the owner of premises fronting such parts of Carr Hill as required to be paved. On March 20, 1902, the appellant sold the premises, which were conveyed to the purchaser on April 25, 1902. The surveyor to the respondents duly apportioned 45*l.* as the proportion due from the appellant in respect of the expenses. Written notice of the apportionment, dated November 18, 1902, was, on November 24, 1902, served personally on the appellant by the respondents, in accordance with the Public Health Act, 1875, s. 257, and he did not within three months from the service dispute the same by written notice. On May 20, 1903, a formal demand in writing for payment of the 45*l.* was served by the respondents on the appellant personally in accordance with the Public Health Act, 1875, s. 257. The justices were of opinion that the appellant was liable to pay the sum demanded by the respondents, and they made an order accordingly.

The Divisional Court reversed the decision of the justices on the authority of a dictum of Cockburn C.J. in *Reg.* v. *Swindon Local Board* (1) to the effect that, in order to be liable under the Public Health Act, 1875, s. 257, a person must continue to be owner when the expenses are demanded from him. The respondents appealed.

Macmorran, K.C., and *Joshua Scholefield*, for the respondents. The words of s. 257 of the Public Health Act, 1875, clearly provide that the person who was the owner of the premises when the works were completed is liable for the expenses. The observations of Cockburn C.J. in *Reg.* v. *Swindon Local*

(1) 4 Q. B. D. 305.

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Board (1), which the Court below thought binding upon them, do not, of course, bind this Court, and they were really only a dictum, for in that case the person sought to be charged had ceased to be the owner of the premises before the completion of the works.

[They also cited *In re Bettesworth and Richer* (2); *Hornsey Local Board* v. *Monarch Investment Building Society* (3); *Stock* v. *Meakin* (4); *In re Allen and Driscoll's Contract.* (5)]

Israel Davis, for the appellant. It is true that the point actually decided in *Reg.* v. *Swindon Local Board* (1) differs from that in the present case in that the person sought to be charged in that case had ceased to be the owner of the premises before the works were completed; but the observations made by Cockburn C.J. to the effect that, in order to render a person liable under s. 257, he must continue to be the owner when the expenses are demanded, can hardly be looked upon as a mere dictum, for they form the ratio decidendi of the case. It is a general principle that a Court, whatever might have been their opinion on a matter if it had been res integra, will not reverse a decision, or even a dictum, after it has stood for a long time unquestioned, and many business transactions must have been entered into on the faith of it. The view taken in *Reg.* v. *Swindon Local Board* (1) has remained unquestioned for a long time, and many contracts between vendors and purchasers of premises must have been entered into and dealt with on the footing that it was good law. The case of *In re Bettesworth and Richer* (2) and the other cases cited by the respondents' counsel related, not to the personal liability of the owner, but to the charge on the premises in respect of paving expenses, a matter which admits of quite different considerations. Sect. 150 contemplates as a condition of liability that the owner should be in default. There cannot be a default before the sum payable is apportioned and payment demanded, and a person who ceases to be owner before the apportionment and demand of payment cannot

(1) 4 Q. B. D. 305.
(2) (1888) 37 Ch. D. 535.
(3) (1889) 24 Q. B. D. 1.
(4) [1900] 1 Ch. 683.
(5) [1904] 2 Ch. 226.

be an owner in default. [He cited *Reg.* v. *St. Marylebone Vestry.* (1)]

COLLINS M.R. This is an appeal by a local authority from a decision of the Divisional Court, by which it was held that one Millard was not liable for certain paving expenses which had been imposed on him by the local authority. He was, at the time when he was served with notice requiring him to do the paving work, the owner of premises fronting on the street in which the work was to be done. The owners did not execute the work themselves, and the usual course was pursued; that is to say, the local authority did the work and then apportioned the expenses among the frontagers, and demanded payment from them. Millard was still owner of the premises at the time when the work was completed by the local authority; but he had ceased to be owner before the giving of the notice of apportionment and before the demand for payment of the apportioned sum was served upon him. The Court below held, following the observations of the Court in the case of *Reg.* v. *Swindon Local Board* (2), decided in the year 1879, and in deference to the opinion there expressed, though contrary to their own opinion, that Millard was not liable to pay the sum apportioned on him.

It therefore becomes necessary to look at the statute under which the obligation was imposed, namely, the Public Health Act, 1875. The material sections are ss. 150 and 257. Sect. 150 provides for the giving of notice by an urban authority to owners of houses fronting on streets not properly paved requiring them to do paving works, and continues thus: "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act." The section contemplates a default,

(1) (1887) 20 Q. B. D. 415. (2) 4 Q. B. D. 305.

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that default, looking to the context of the section, presumably consisting in failure by the owners to do what they were required to do. We then come to s. 257, which introduces the specific provision under which the owner comes under liability, if he is liable at all. That section provides that "where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act, or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." That section in absolutely unambiguous language defines the person who is liable to pay the expenses as being the "person who is the owner of such premises when the works are completed."

In this case Millard was the owner of the premises when the works were completed, and, on the language of the section, there is no doubt that he fulfilled the conditions of liability. The only suggestion of an argument to the contrary is based on the fact that the earlier section contemplates a default as forming the basis of the liability to be enforced by summary proceedings. But, as I have already indicated, that default appears from the context to be default in executing the works required to be done by the notice, not default in payment of the sum demanded. Sect. 150 provides that, "if such notice is not complied with," the local authority may do the work, and may recover in a summary manner the expenses incurred by them "from the owners in default." The default contemplated appears to be non-compliance with the notice. Whether on the terms of that section alone the owner making default in doing the works required by the notice would remain permanently liable, although he did not continue to be owner at the time of the completion of the works, it is not necessary

to consider. For, when we come to s. 257, we find that in absolutely unambiguous terms it makes the person who is owner when the works are completed liable. Whether any other person would also be liable it is not necessary to consider.

The Divisional Court regarded themselves as bound by the authority of *Reg.* v. *Swindon Local Board.* (1) If the matter had been res integra, they would not have come to the same conclusion, but they reluctantly followed a dictum of Cockburn C.J., which appeared to them to form the ground of the decision in that case. There is, however, an important distinction between that case and this, for there the person on whom the demand for payment was made had ceased to be owner before the completion of the works. He, therefore, clearly did not come within s. 257. The Lord Chief Justice, however, made the following observations: "I cannot think it was ever intended by the Legislature that, when the owner has parted with his property and somebody else is in possession of it, and therefore getting the benefit of the work done, and who ought therefore to pay the expenses incurred, it should be competent for the local authority to follow him up wherever he may have gone, and hold him personally liable. I think that defect is remedied by the 257th section, which treats owners upon whom notice was originally served, and who are the owners at the time the work is completed and the expenses demanded, as the persons upon whom the local board shall be able to come for the expenses. I cannot suppose it was intended that both should be liable—the owner who made default originally in not doing the work, and the owner who is the person who has become the owner at the time the work is completed. What was meant was this. If the owner, who is called upon to do the work and who makes default in doing it, continues the owner at the time the work is executed and when the money laid out upon it is demanded, then he is liable under the 150th section, but, if in the meantime he has ceased to be owner, he cannot be said to be the owner in

(1) 4 Q. B. D. 305.

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default at the time the money is demanded, and when another has stepped into his shoes and become the owner." It has been pointed out that these observations were merely obiter as not being essential to the decision of the case. They involve the proposition that there is no liability under s. 257 unless the person sought to be made liable continued to be owner of the premises when the sum apportioned in respect of them was demanded, a proposition which is not warranted by anything in the language of the Act, and which was not applicable to the case, because there the person sought to be made liable had ceased to be owner before the works were completed. I do not think that the opinion so expressed on a point which the facts of the case did not raise can be considered a binding authority. In this case Millard had not ceased to be owner of the premises until after the completion of the works, and therefore by the express terms of the Act is rendered liable. For these reasons I think that we must give effect to what was really the view taken by the Court below by allowing the appeal.

STIRLING L.J. I am of the same opinion. In this case Millard was the owner of the premises at the time when the works in respect of which it is sought to charge him were completed, and therefore, upon the words of s. 257 alone, would clearly be liable. It is, however, argued that that section must be read together with s. 150, which provides that the expenses of the paving works may be recovered in a summary manner from "the owners in default," and, therefore, that to make a person liable he must not only be an owner when the works are completed, but also an owner in default. Now what is the default contemplated by s. 150? It appears to me to be default in executing the works required by the notice under that section to be done. The section provides for the giving of a notice requiring the frontagers on the street to do certain works, and that, if the notice is not complied with, the local authority may execute the works themselves and recover the expenses of so doing from "the owners in default," i.e., in my opinion, the owners who have not complied with the

notice. If that be the meaning, Millard remains liable, for he was the owner of the premises when the notice to do the works was given and he failed to comply with it, and he was also owner when the works were completed. Therefore it appears to me that on the words of the Act his liability is clearly made out. I have the less difficulty in coming to this conclusion, because it is that which really commended itself to the members of the Divisional Court, though they felt themselves constrained to give effect to the view expressed by Cockburn C.J. in *Reg.* v. *Swindon Local Board.* (1) The question which arose in that case, and was actually decided, was different from that which arises in the present case. There the person sought to be charged was the owner of the premises when the notice to do the works was given, but had ceased to be the owner of them when the works were completed; and therefore he did not come within the words of s. 257. That being so, the decision is not a precedent applicable to the question in the present case. It is argued that the ground of the decision, according to the report in the *Law Reports,* was that, in order to be liable under s. 257, a person must have been the owner when the notice was originally served, and also when the works were completed and when the expenses were demanded. In this case no doubt Millard was not the owner of the premises when the expenses were demanded from him. But, as I have pointed out, no question arose in the case of *Reg.* v. *Swindon Local Board* (1) whether it was necessary that the person to be made liable should continue to be owner of the premises at the time when the expenses are demanded. There are no words in s. 257 involving such a necessity, and, speaking for myself, I cannot see how such a limitation can be imported into the words of the section. We are really asked not to apply the decision in the case of *Reg.* v. *Swindon Local Board* (1), but to extend it to a case in which it is not in point. If we were satisfied with the reasoning in that case, it might be right to do so; but, not being so satisfied, I do not think we ought to give effect to it as governing the present case.

(1) 4 Q. B. D. 305.

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MATHEW L.J. I am of the same opinion for the same reasons as have been expressed by the Master of the Rolls and my brother Stirling.

Appeal allowed.

Solicitors for appellant: *Halse, Trustram & Co., for A. Muir Wilson, Sheffield.*

Solicitors for respondents: *Speechly, Mumford & Craig, for Frank Allen, Doncaster.*

E. L.

C. A. 1904 *Nov.* 4.

[IN THE COURT OF APPEAL.]

IN THE MATTER OF AN ARBITRATION BETWEEN RICHARD AND THE GREAT WESTERN RAILWAY COMPANY.

Railway Company — Mines near Railway — Notice to prevent working — Arbitration — Compensation — Interest on Amount awarded — Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

Where an owner, lessee, or occupier of mines or minerals lying under or near a railway gives notice to the railway company, under s. 78 of the Railways Clauses Act, 1845, of his intention to work the same, and the company give notice of their willingness to make compensation, and the amount of compensation is determined by arbitration under the Lands Clauses Act, 1845, the arbitrator has no power to award interest, in respect of the time between the giving of notice by the company and the making of the award, upon the sum awarded as compensation.

APPEAL from the judgment of Channell J. upon a point of law raised by the award of an arbitrator under the Railways Clauses Act, 1845, and the Lands Clauses Act, 1845.

The claimant was the lessee of certain seams of coal under or within forty yards of the railway of the Great Western Railway Company, and gave to the company notice, under s. 78 of the Railways Clauses Act, 1845, of his intention to work the same. It appeared to the company that the working of the seams of coal would be likely to damage their works, and they gave notice that they were willing to make compensation in respect of the non-working of the seams. No agreement was arrived at as to the amount of compensation, and the

matter was referred to an arbitrator appointed under the Lands Clauses Consolidation Act, 1845.

The arbitrator made an award upon which several questions arose, which were argued in the Court below, and in the Court of Appeal upon this appeal and a cross-appeal, but the only point dealt with in this report is the question whether the arbitrator could award the payment of interest upon the sum arrived at by him as the compensation to be paid by the company, the arbitrator having awarded a certain sum of money as compensation, and directed the payment of a further sum of money as interest, calculated from the date of the notice given by the railway company to the time of the making of the award.

The learned judge was of opinion that the claimant was entitled to the interest awarded, and gave judgment accordingly.

The company appealed.

Cripps, K.C., and *Moon, K.C.* (with them *Howard Wright*), for the company. The decision of the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks* (1), which was a decision on clauses in the Waterworks Clauses Act, 1847, similar to those of the Railways Clauses Act, 1845, shews that there was no purchase or transfer of the property in the coal. *Great Northern Railway* v. *Inland Revenue Commissioners* (2) is an authority to the same effect. It follows that the doctrine that a vendor is entitled to interest upon unpaid purchase-money is not applicable to this case. The case of *Fletcher* v. *Lancashire and Yorkshire Railway* (3) was decided upon an Act under which property passed, and has no bearing upon the present case. There was, from the time that the claimant was prevented from working his coal, a claim to be compensated, but until the award the amount could not be ascertained. It cannot be said, therefore, that there was any contract to pay interest or that the principal money had been wrongfully withheld, and the opinion of Lord Westbury in *Caledonian Railway* v.

(1) [1903] A. C. 426. (2) [1901] 1 K. B. 416.
(3) [1902] 1 Ch. 901.

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Carmichael (1), that except in those cases interest cannot be demanded, applies to this case.

S. T. Evans, K.C. (with him *Abel Thomas, K.C.*, and *George Cave, K.C.*), for the claimant. The award of interest was right, as it is in accordance with the equitable doctrine laid down in *Birch* v. *Joy* (2), which is applicable where under statutory powers a land owner is prevented from using his land. From the time when the notice was given by the company the claimant has been deprived of his right to work the coal, and the company have had the advantage of that deprivation of right and have retained the money which was its equivalent. The claimant's position was, therefore, similar to that of a vendor in respect of unpaid purchase-money. This view is supported by the decision of Buckley J. in *Fletcher* v. *Lancashire and Yorkshire Railway.* (3)

Moon, K.C., in reply.

COLLINS M.R. The point in the appeal of the railway company is whether the arbitrator was entitled to allow a sum for interest, in addition to the sum for compensation assessed by him under s. 78 and the following sections of the Railways Clauses Consolidation Act, 1845. I think the case is susceptible of short treatment, as this point is, in my opinion, concluded by decisions in the House of Lords.

The point arises in this way: The lessee of mines who had works near a railway gave notice to the company indicating that he was about to work those mines. That let in the right of the company to give what has been called a counter-notice, which would have the effect of staying the working of the mines on the company expressing their willingness to pay compensation for the barring of the further working of the minerals. That is a matter of compensation, and, as I have said, it seems to me to have been clearly decided that the arbitrator in such a case is not entitled to give a sum for interest in addition to a sum for compensation. The case is not one of sale and purchase, and the compensation awarded

(1) (1870) L. R. 2 H. L., Sc. 56. (2) (1852) 3 H. L. C. 565.
(3) [1902] 1 Ch. 901.

by the arbitrator under the machinery provided measures the whole rights of the parties.

The first case to which I will refer is *Caledonian Railway* v. *Carmichael* (1), of which the head-note is this: "Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand, it was held by the House, reversing the decision below, that the right to interest on the principal sum did not commence until after the debt had been established, and the precise amount settled"; and the head-note continues: "Per Lord Westbury: Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld." Then comes another case, decided in 1903, also by the House of Lords—*Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (2) The head-note of that case is this: "Owners of coal mines under and near waterworks gave the undertakers notice under s. 22 of the Waterworks Clauses Act, 1847, that they intended to work the coal. The undertakers replied by a counter-notice requiring the mine owners not to work and stating their willingness to make compensation. In an arbitration under the Act and the Lands Clauses Acts to assess the compensation the mine owners gave evidence to prove that coal rose in value after the date of the counter-notice:—*Held*, that there was no purchase of the coal or transfer of the property in the coal; that the inquiry was not what was the value of the coal at the date of the counter-notice, but what would the coal owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it; and that the evidence was admissible."

Taking those two decisions together, it appears that the matter to be determined is not what is the price to be paid as upon a sale, but what is the sum to be assessed by way of compensation, and at the time when the company gave their counter-notice the stage at which there could be a contract, express or implied, to pay interest was not reached. Nor is there the alternative—that of a breach of duty sounding in

(1) L. R. 2 H. L., Sc. 56. (2) [1903] A. C. 426.

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damages—so as to let in the right to recover interest in the nature of damages. The matter is simply the assessment of compensation, and at no stage in the discussion until the amount due has been ascertained can any implication as to interest arise. Neither, in such circumstances, is there any foundation for a claim for breach of contract in not paying over the money in a reasonable time. Such a question could only arise after the amount had been ascertained in manner provided by the Act of Parliament. The case which was relied on as suggesting a contrary view to that which I have expressed was *Fletcher* v. *Lancashire and Yorkshire Railway* (1), before Buckley J. That decision arose upon an Act of Parliament which involved a sale. In such a case the obligation to pay the purchase-money arises, and that may involve an obligation to pay interest; but that is not the present case.

In my view, for the reasons that I have given, the arbitrator had no jurisdiction to award interest in addition to compensation, and the appeal must succeed.

STIRLING L.J. I am of the same opinion.

The question in the appeal is whether an arbitrator appointed to assess the amount of compensation payable by a railway company to a mine owner who is prevented under s. 78 of the Railways Clauses Act, 1845, from working his mine has jurisdiction to award interest eo nomine upon the amount awarded as compensation.

The main contention in support of his jurisdiction to do so is that there was a legal principle established by the decision of the House of Lords in *Birch* v. *Joy* (2), and applied recently by Buckley J. in *Fletcher* v. *Lancashire and Yorkshire Railway* (1), which entitled the arbitrator to award interest. It seems to me that there is a short answer to this suggestion when the cases are examined. The case in the House of Lords, the decision in which is of course binding upon us, was decided with reference to the rights of a vendor and a purchaser of real estate under an ordinary contract for sale and purchase. The case decided by Buckley J. turned, not upon the Railways

(1) [1902] 1 Ch. 901. (2) 3 H. L. C. 565.

Clauses Act, but upon the terms of a special Act of Parliament under which the learned judge came to the conclusion that the relation of vendor and purchaser existed, and he thereupon applied the rule that had been laid down in the House of Lords in the case to which I have referred.

The answer to the argument founded on those cases is that in the present case the relation of vendor and purchaser does not exist. That has been expressly decided in two cases both binding on this Court. One is *Great Northern Railway* v. *Inland Revenue Commissioners* (1), which was a decision under the Stamp Act, 1891, but involved the consideration of s. 78 of the Railway Clauses Act, 1845, with which we have to deal on this appeal. The other is *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks* (2), which was a decision on the Waterworks Clauses Act, which contains sections identical with those which we have to consider. The decision of the House of Lords was that proceedings under the clauses then being dealt with did not establish the relation of vendor and purchaser. The Lord Chancellor in giving judgment said: "It was not a purchase of the coal, nor is it analogous to a purchase of the coal"; and Lord Macnaghten said: "The counter-notice by the undertakers following a notice of the mine owners under s. 22 does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mine owner is prohibited from working, and the undertakers are bound to make full compensation. That is all." It seems to me, therefore, that the fundamental ground of the argument fails.

MATHEW L.J. I am of the same opinion. With reference to the question of the right to the payment of interest, it is argued that the notice given by the railway company created the relation of vendor and purchaser between the parties. There is in my opinion no authority for this argument. The counter-notice is merely a notice that the company,

(1) [1901] 1 K. B. 416. (2) [1903] A. C. 426.

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in accordance with the terms of the Act of Parliament, are willing to submit the question of compensation to arbitration, and until the amount of compensation is ascertained it is impossible to say that there is anything analogous to a contract to sell or to buy. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for claimant: *Pontifex, Hewitt & Pitt.*
Solicitor for company: *R. R. Nelson.*

A. M.

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[IN THE COURT OF APPEAL.]

WATSON AND ANOTHER *v.* CHARLESWORTH AND ANOTHER.

Mine—Mining Lease—Construction—Covenant to win, work, and get, fairly, duly, and honestly the whole of the Coal.

By a mining lease, by which such part of a seam of coal as lay under certain lands of the lessors was demised for a term of years, there was reserved an annual rent of 100*l.* for an acre of the coal, as soon as the lessees should commence to work the coal, and, until then, an annual rent of 5*l.*; and the lessees covenanted that they would at all times during the term fairly, duly, and honestly, win, work, and get the whole of the said seam of coal in a proper and workmanlike manner. Owing to faults it turned out to be impossible to win and work the coal, except at such a cost as would have entailed very heavy pecuniary loss on the lessees, and they consequently declined to do so:—

Held, that, on the true construction of the above-mentioned covenant, the words "fairly, duly, and honestly" must be read as adding to, and not as detracting from the obligation to win, work, and get the coal imposed by the covenant, and, therefore, the lessees had committed a breach of it in respect of which they were liable in damages to the lessors.

Questions as to proof and measure of damages for breach of the above-mentioned covenant considered.

Walker v. *Jeffreys*, (1842) 1 Hare, 341; 58 R. R. 90, and *Jervis* v. *Tomkinson*, (1856) 1 H. & N. 195, followed.

APPEAL against the judgment of Channell J. upon the award of an arbitrator stated in the form of a special case.

The appellants were the grantors of a mining lease dated

December 18, 1885, and the respondents were the lessees under the same.

The lease, so far as material, was as follows. The appellants thereby appointed under a power and demised to the respondents for the term of twenty-one years "All so much and such part of the mine, bed, vein, or seam of coal, usually called or known by the name of the Haigh Moor seam of coal, as is now lying and being within and under two pieces or parcels of land situate at Lake Lock in the parish of Wakefield in the county of York, and which were formerly three closes, and called the New Ing Banks, Little Ing Banks, and Black Lees . . . . save and except all such parts of the said mine, bed, vein, or seam of coal as are within the space of twenty yards from the bank of the river Calder . . . . yielding and paying therefore as soon as the said lessees shall commence working the said coal yearly and every year during the said term (subject to the provisoes hereinafter contained in that behalf) the clear annual rent of 100*l.* for an acre of the said coal by two half-yearly payments on the 2nd day of February and the 2nd day of August in each year, the first payment thereof to begin and be made on the half-yearly day next after the said lessees shall have commenced working the said coal; and yielding and paying yearly and every year during the continuance of this demise the further sum of 100*l.* for every acre of the said coal, and so in proportion for any greater or less quantity than an acre of the said bed of coal, which shall be won, wrought, or gotten by the said lessees in any one year over and above the said quantity hereinbefore mentioned (subject to the proviso hereinafter contained in that behalf), the payment of the said last reserved rent or sum to be made from time to time at the end of the current year during which such surplus quantity shall be gotten; and also yielding and paying yearly and every year during the said term, until the said lessees shall begin to work and get coal from and out of the said mine, bed, vein, and seam, the annual rent of 5*l.* to be paid and payable at the times and in manner aforesaid: provided always, and it is hereby declared and agreed that, if the said lessees shall not work or get from or out of the said mine, bed, vein, and seam

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of coal the quantity hereinbefore mentioned in that behalf in any one year of the said term hereby granted, then and so often as it shall happen, it shall and may be lawful for the said lessees, their agents, servants, and workmen in any succeeding or following years of the said term to win, work, get, and carry away all such deficiency or short gettings from the same bed or seam of coal without paying any further or other yearly rent or sum than the stipulated annual rent of 100*l.* so reserved and made payable as aforesaid: provided also that it shall be lawful for the said lessees at any time during the said term, and without making any additional payment therefor, to win, work, get, and carry away from and out of the said bed and seam of coal such quantity of the said coal as at the rate above mentioned shall be required to make up the amount paid by the lessees under the agreement hereinbefore contained for the payment of the said rent of 5*l.* per annum: provided also, and it is hereby declared and agreed that, if the said lessees shall duly and honestly win, work, recover, obtain, and get or pay for the whole of the said demised mine, bed, vein, or seam of coal before the determination of the term hereby granted, the rents and other payments hereby reserved shall thereupon cease and absolutely determine." Then followed a provision for the ascertainment from time to time of the quantity of coal won, wrought, and gotten by the lessees under the lease by two surveyors to be appointed, one by the lessors and the other by the lessees, or their umpire in case of disagreement between them.

The lessees covenanted (inter alia) "that the said lessees and their several agents, servants, colliers, and workmen shall and will at all times during the said term hereby appointed fairly, duly, and honestly win, work, recover, obtain, and get the whole of the said mine, bed, vein, or seam of coal hereby demised in a proper and workmanlike manner, and also that they, the said lessees, shall not nor will desist from working and using any of the workings until all the coal which can or may with ordinary safety to the workmen, or according to the ordinary method of working, be first got thereout, and shall and will well and effectually preserve, support, and maintain

the several water levels, drifts, and subterraneous roads and ways and the roofs thereof in a good state of repair, order, and condition . . . . and further that they, the said lessees and their agents, servants, colliers, and workmen shall not nor will, in working or getting the said mine, bed, vein, and seam of coal hereby demised, sink or open any pit or shaft, nor break open, nor injure the surface of the lands or grounds under which the same is situate, nor win, work, or get any coal under or within the space of twenty yards from the bank of the said river Calder." The lease contained a provision for the reference to arbitration of any dispute arising thereunder, and under that provision the arbitrator by whom the case was stated had been appointed.

The demised area was ten acres in extent, and the area of coal agreed to be left as a barrier between the workings and the river Calder was approximately one acre. At the date of the lease the lessees were getting the Haigh Moor seam of coal by means of workings from a pit called the Parson's Pit, which was situated about a thousand yards from the nearest point of the lessors' property. At that time these workings had reached the point marked B on a plan annexed to the case, and the existence of a large (200 yards) fault, shewn on the plan at a distance of 140 yards from the demised area, was well known to the parties to the lease. In the course of the workings from the Parson's Pit faults were also discovered at the points marked A and B on the plan, and, the lessees, having come across another fault which had not been proved, but was known to exceed twenty-four yards, drove a number of drifts, in the directions shewn on the plan, with the object of proving the coal. These operations, which extended over a period of several years and involved a large expenditure of money, were unsuccessful; and, although the workings were continued until 1898, they were then abandoned and the Parson's Pit dismantled. The lessees had paid rent at the rate of 5*l.* per annum from the date of the lease to August 2, 1901.

On February 3, 1899, a letter was written on behalf of the lessors to the lessees complaining that they were not working the coal. On February 6, 1899, the lessees replied, stating that

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it had proved impossible to get to the coal, and contending, in effect, that the lease left it optional with them whether they would do so. The matter was subsequently referred to arbitration.

The arbitrator found and awarded in the special case as follows: "Any coal that may exist within the demised area could, by means of drifts specially driven for that purpose, have been won and gotten before November, 1902, the date of the reference to arbitration; but, having regard to the difficulties encountered by them in the adjoining parts of the mine, the lessees came to the conclusion that such working would not prove profitable, and I find that, in a commercial sense, they acted prudently in abandoning the undertaking. The coal worked from the Parson's Pit was demised to the lessees by various owners, and the solicitor who negotiated the said lease on behalf of the lessors stated in cross-examination that it was known during the negotiations that the lessees proposed to work the several demised areas as one colliery, but, save as aforesaid, I find that neither the lessors nor their agents had any notice or knowledge of the terms or conditions of the leases granted by the owners of the other demised areas of coal. Even on the assumption that the several mines in lease to the lessees were to be worked together as one colliery, and that the coal demised by the said indenture of lease could not be worked in advance of the coal of the other lessors, I find that the coal within the demised area could, in the ordinary course of working, if carried on regardless of expense, have been won and gotten before November, 1902, but that the operations would have been extremely costly, and would have entailed very heavy pecuniary loss upon the lessees. It has not been established either that coal does exist or that it does not exist within the demised area. In all probability workable coal does exist within the area, though the seam is in such a faulty condition that a part only, say four and a half acres (exclusive of the barrier), would be paid for by the lessees under the covenants of the lease, if worked under ordinary conditions, but without any regard to the cost of working. The lessors, after the date of the lease and prior to the year 1902, sold the surface superjacent

to the demised area, and are not in a position to win the coal (if any) within the demised area. If the Court should be of opinion that the lessees enjoyed a right of option to work the coal or not to work the coal as they pleased, then I award and direct that the lessees are not under any liability to the lessors (except as to the payment of the rent of 5*l.* reserved by the lease), and that the lessors do pay to the lessees their costs of and incidental to the reference and do pay the costs of this my award; and, if the Court should be of opinion that the lessees were under obligation to work the coal, but that the lessors are not entitled to damages, except in respect of coal which they have proved affirmatively and positively to exist within the demised area, I make a like award. If the Court should be of opinion that the lessees were under obligation to work the coal, and that the lessors are entitled as damages to the value of ten acres of coal assessed at 100*l.* per acre (less the value of the barrier and the sum of 78*l.* already paid), I award and direct that the lessees do pay to the lessors the sum of 822*l.* and their costs of and incidental to the reference, and also do pay the costs of this my award; and, if the Court should be of opinion that the lessees were under obligation to work the coal, and that the lessors are entitled as damages to the amount which I find would in all probability have been paid to them under the lease, if the lessees had won and gotten the coal regardless of pecuniary loss to themselves, I award and direct that the lessees do pay to the lessors the sum of 372*l.* and their costs of and incidental to the reference, and also do pay the costs of this my award."

Channell J. gave judgment for the lessees.

R. Neville, K.C., and *MacSwinney*, for the appellants, the lessors. The covenant to win and work the coal is an absolute covenant. The lessees seek to read the words "fairly, duly, and honestly" as importing a limitation of, and not an addition to, the obligation to win and work. It is submitted that they cannot be so construed: *Walker* v. *Jeffreys*. (1) *Quarrington* v. *Arthur* (2), which was relied upon in the Court below by

(1) 1 Hare, 341; 58 R. R. 90. (2) (1842) 10 M. & W. 335; 62 R. R. 635.

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the lessees, is clearly distinguishable; for there the demise was only of mines which had been or thereafter during the term might be discovered or opened; and it was held that a covenant to work those mines was not broken by not working mines which had not been discovered or opened. The scheme of the lease in the present case is this. At the time when it was granted, the lessees were working the Haigh Moor seam under adjacent lands. Until in the regular course of working they got to the coal demised, they were to pay only the nominal rent of 5*l.* per annum; and the intention was that they should be bound to continue fairly, duly, and honestly the regular course of working until they got to the coal demised, and then the heavier rent of 100*l.* per acre of coal was to become payable. The meaning of the word "win" in this connection is defined by Lord Hatherley in *Lewis* v. *Fothergill* (1) as being to put the coal in a state in which continuous workings can go forward in the ordinary way: see also per James L.J. in *Lord Rokeby* v. *Elliot.* (2) Instead of carrying on the workings under adjacent lands so as to win the coal demised as provided for by the covenant, the lessees, when they came to a fault, abandoned the colliery.

With regard to the question as to the amount of damages, the lessors are, it is contended, entitled to the larger sum found by the arbitrator. The presumption as against the lessees, by reason of whose breach of covenant the amount of coal which could have been got remains unknown, is that the full nine acres of coal existed under the surface, and could have been worked. The lessees are not under the circumstances entitled to throw on the lessors the onus of shewing that coal to the amount contemplated by the lease existed and could have been got. If they rely on the non-existence of the coal as a defence, it is for them to prove it.

[They also referred to *Clifford* v. *Watts.* (3)]

C. A. Russell, K.C., and *O. Leigh Clare*, for the respondents the lessees. The reasonable construction of the covenant is not that contended for by the lessors. The lease in the

(1) (1869) L. R. 5 Ch. 103. (2) (1879) 13 Ch. D. 277.
(3) (1870) L. R. 5 C. P. 577.

present case cannot be read as importing a warranty by either party of the existence of any coal under the surface of the lessors' land. The demise, fairly construed, is a demise of such part of the seam, if any, as is lying under the pieces of land mentioned in the lease. The lessees are prohibited by the lease from winning the coal by sinking a pit on the lessors' land. The only possible way, therefore, of winning the coal was through the workings carried on from the Parson's Pit, which was 1000 yards away in adjacent lands. This was known to both parties; and it was also known to them that there were faults in that locality, one of which was very extensive, the result being that the seam might disappear altogether, and it was quite uncertain whether there was any part of the seam which could be worked in the demised area. The lease must be construed in reference to the circumstances under which it was entered into by the parties. It is submitted that under those circumstances it is not reasonable to construe the covenant as importing an absolute obligation to win and work the coal, and that it should be construed as meaning that the lessees are only to be bound to win and work the coal, if it can be done in the fair, due, and honest course of working. It would not be a reasonable construction that, although there should be no coal fairly workable from a business point of view under the lessors' land, they should be entitled to call on the lessees to work the coal at a wholly disproportionate cost and so incur a heavy loss. On that construction the lessors would be getting payment for a subject-matter which for all practical purposes did not exist. The arbitrator finds that the lessees carried on unsuccessful operations for a number of years at great cost in order to win the coal. It cannot therefore be said that they did not fairly, duly, and honestly carry on their workings with a view to winning the coal. If they had gone on working, ruinous expense would have been incurred, and the whole of the term might have been consumed before they reached the coal. The words of the covenant in *Walker* v. *Jeffreys* (1) were different from those of the covenant in the present case, and the decision seems to

(1) 1 Hare, 341; 58 R. R. 90.

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be merely that under that covenant it was not at the plaintiffs' option whether they would work the mine or not, and not that they would have been bound to work it if practically impossible. It may be admitted that the covenant in this case imports that the lessors are entitled to call on the lessees to take all reasonable steps to "win" the coal, which means, according to *Lewis* v. *Fothergill* (1), to bring it into a condition for working. This the lessees have done, and it is contended that they are not bound to do more.

Secondly, it is for the lessors to prove that they have sustained damage, and, if so, to what extent. The measure of damage is what, if anything, they have lost by non-fulfilment of the covenant. They have not shewn the existence of any coal under their land, and, if there had been none there, they would not under the terms of the lease have ultimately got anything at all. They cannot be entitled to say, without any proof of damage at all, that the covenant has been broken and they are therefore entitled to damages on the assumption that there were nine acres of workable coal demised.

[They cited *Jervis* v. *Tomkinson*. (2)]

R. Neville, K.C., in reply.

COLLINS M.R. This is an appeal against the judgment of Channell J. upon a case stated by an arbitrator with reference to a claim made for damages for breach of a covenant in a mining lease. The material portions of the lease are as follows: [The Master of the Rolls here read the provisions of the lease set forth above.]

The arbitrator has in the case found certain facts upon which the question whether the lessees are liable to pay damages as for a breach of covenant arises. In order to see whether the lessees are so liable, it is necessary to construe the covenant. The facts are thus stated by the arbitrator. He states that "any coal that may exist within the demised area could, by means of drifts specially driven for that purpose, have been won and gotten before November, 1902, the date of

(1) L. R. 5 Ch. 103.

(2) 1 H. & N. 195.

the reference to arbitration; but, having regard to the difficulties encountered by them in the adjoining parts of the mine, the lessees came to the conclusion that such working would not prove profitable: and I find that, in a commercial sense, they acted prudently in abandoning the undertaking." The lessees did abandon the undertaking, and the lessors thereupon claim damages as for breach of covenant. The arbitrator proceeds further to find as follows: "Even on the assumption that the several mines in lease to the lessees were to be worked together as one colliery, and that the coal demised by the said indenture of lease could not be worked in advance of the coal of the other lessors, I find that the coal within the demised area could, in the ordinary course of working, if carried on regardless of expense, have been won and gotten before November, 1902, but that the operations would have been extremely costly, and would have entailed very heavy pecuniary loss upon the lessees. It has not been established either that coal does exist, or that coal does not exist, within the demised area. In all probability workable coal does exist within the area, though the seam is in such a faulty condition that a part only, say, four and a half acres (exclusive of the barrier), would be paid for by the lessees under the covenants of the lease, if worked under ordinary conditions but without any regard to the cost of working."

The first thing which has to be considered with reference to these findings, in order to see whether the lessees have come under an obligation to pay damages, is the construction of the covenant. The lessees contend that, taking into consideration all the words of the covenant, there is no absolute obligation to win the coal, but only to win it if, under all the circumstances, they can fairly and honestly be called upon to do so. They seek to get out of the words "fairly, duly, and honestly" a limitation on their obligation; and they lay great stress for that purpose on the word "fairly." They say that, if, under the circumstances, it would be so unreasonable as to be unfair as between man and man that they should be expected to incur such an inordinate expense as would be necessary to win the coal, then an obligation to win the coal does not arise

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under the words "fairly, duly, and honestly win." As I have said, according to that construction the words "fairly, duly, and honestly" impose a limitation on the obligation to win the coal. I do not think that is so; and there is, I think, strong authority that such is not the true construction of the covenant. Those words are in my opinion inserted for the benefit of the covenantees, and not of the covenantors. The lessees covenant to win and work the coal, and they covenant to win and work it "fairly, duly, and honestly." Those words are inserted as a security that they will use fair, due, and honest efforts to win the coal, by which is meant, according to the definition of the word "win" accepted by both parties, to take the necessary preliminary steps to enable the coal to be worked in the ordinary way, so that the period when the heavier rent will become payable under the lease may not be unduly delayed. The words, so far from detracting from the obligation to win the coal, are in my opinion intended to impose an additional obligation as a security to the lessors for obtaining in due time the heavier rent reserved by the lease.

That is the view which was taken of a similar covenant in *Walker* v. *Jeffreys*. (1) The covenant in that case was that all the mines should be fairly got, and regularly worked out, to as little disadvantage as possible to one Carpenter, his heirs, executors, administrators and assigns; and some of the words of the covenant would seem to have been fastened upon in argument as indicating a qualification of the obligation of the covenantors to work the mines. The action was brought by lessees to enforce an agreement for the renewal of a mining lease; and, by way of defence, the lessors set up a breach of the covenant by the lessees, and the question arose what the true construction of such a covenant must be held to be. Wigram V.-C. thus dealt with that question: "The first point (so far as it relates to the economical working of the mines, whilst they were worked) and the fourth point must (if it is desired) be the subject of inquiry, although neither party will probably think the result of such inquiry of import equivalent to the expense likely to attend it. I cannot

(1) 1 Hare, 341; 58 R. R. 90.

accede to the plaintiffs' view of the other question involved in the first point—that the true construction of the covenant is, that the lessees may work the mines or not at their discretion. The clearest language would be necessary to satisfy me that Cocker, the mortgagee, whose trustee Carpenter was, intended to accept a surface rent just equal to the interest of his mortgage debt, and (no sleeping rent being reserved) to convert his interest in the mines, at the option of the lessees, into a dry reversion expectant upon two leases of sixty-three years' duration. I do not find anything in the language of the covenant to force me to so improbable a construction. The covenant with Carpenter is, in equity, a covenant with Cocker, and it is, 'that all the mines shall be fairly got and regularly worked out.' So far it is imperative; and I think that the subsequent words, which impose upon the lessees the obligation to work the mines 'to as little disadvantage as possible to Carpenter, his heirs, executors, &c.,' do not so affect the construction of the previous words as to cancel the obligation which they would create. Such a construction of the covenant would not be reasonable. I think the covenant was intended to oblige the lessees regularly to work the mines and something more. . . . I cannot understand how a man, who covenants to work mines, can be freed from the obligation to work them, because, in addition, he covenants that it shall be done in a workmanlike manner." The important point in those observations is that the Vice-Chancellor said that the covenant that the mines should be fairly got and regularly worked out was imperative. That is one instance in which a covenant of this kind was so construed. Another is to be found in the case of *Jervis* v. *Tomkinson*. (1) In that case the plaintiff had let to the defendants a mine of rock salt; and the defendants had covenanted with the plaintiff that they would, in every year of the term, get and raise from the mine 2000 tons of rock salt, and in case of default would, at the expiration of the year, pay the plaintiff 6*d*. a ton for every ton by which the quantity was less than 2000; and also that they would, with all reasonable diligence, sink a

(1) 1 H. & N. 195.

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shaft to the salt rock in order to get at the salt; and also would, during the continuance of the term, work the mine in a proper and workmanlike manner. The action was brought for breaches of those covenants, the fourth breach assigned being that the defendants did not, during the continuance of the term, work the mine in a proper and workmanlike manner, but permitted the same to be unworked. Various pleas were pleaded, the last plea being that the defendants did, during the continuance of the term, work the mine in a proper and workmanlike manner. At the trial it appeared that the defendants, in consequence of an influx of brine, had never worked the mine, and the jury found that the defendants could not have worked the mine by any reasonable application of labour, diligence, skill, money, or other means, and that they were prevented from working it by the influx of brine. It was held, inter alia, that the plaintiff was entitled to the verdict on the issue raised by the last plea, since the defendants must be taken to have covenanted to work the mine in some way, in as prudent and proper a manner as they could under the circumstances, and therefore had no right to abandon the works altogether. Therefore in that case it was held that the addition of the words "in a proper and workmanlike manner" did not import a limitation of the obligation to work the mines, which was absolute.

Two other points arise in this case on the assumption that the true construction of the covenant is as I have stated. The first of those points, as I understand it, is this. It was contended for the lessees that the demise must be construed as conditional on the existence of coal below the surface of the lands specified, and that no such coal has been proved by the lessors to exist. The words used are certainly not conditional. They import that both parties contract on the hypothesis that such coal exists. The case does not, it may be observed, come before us on a conclusive finding that such coal does not exist. The arbitrator, who is the proper judge of the facts, finds that "in all probability workable coal does exist within the area, though the seam is in such a faulty condition that a part only, say, four and a half acres (exclusive of the barrier), would be

paid for by the lessees, under the covenants of the lease, if worked under ordinary conditions but without any regard to the cost of working." We start, therefore, with the finding that workable coal probably exists, and the fact that the parties have, on the hypothesis that it does exist, entered into a bargain by which the lessees absolutely covenant to win the coal. What has happened is that the lessees have thrown up the lease and refused to win the coal; and they contend that the lessors are not entitled to maintain an action for damages against them for so doing, except in respect of coal which they prove affirmatively and positively to exist within the demised area. I take that to be a complete reversal of the true position of the parties. It appears to me that primâ facie the onus rests on the lessees to prove that the coal which they have absolutely covenanted to win does not exist, in order to justify them in throwing up the lease, the covenants of which they have primâ facie broken.

The only remaining point is as to the amount of damages. The arbitrator has given alternative findings on that point. It seems to me that, taking all his findings together, in all probability it would not be right to assume that, if the coal had been worked, it would have taken nine years to work out the coal demised at the rate of an acre a year; and only on that hypothesis could the larger amount of 822*l.* found by the arbitrator be supported. Alternatively he finds that, if the Court are of opinion that the lessors are entitled as damages to the amount which he finds would in all probability have been paid to them under the lease, if the lessees had won and gotten the coal regardless of loss to themselves, then the sum of 372*l.* is the amount of the damages. It seems to me that this hypothesis is, under the circumstances, the more reasonable one, and therefore that the lessors are entitled to that amount. For these reasons I think that the appeal must be allowed.

STIRLING L.J. I am of the same opinion. The first question is as to the true construction of the lessees' covenant that they will at all times during the term "fairly, duly, and

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honestly win, work, recover, obtain, and get" the whole of the seam of coal demised "in a proper and workmanlike manner." It is contended for the lessees, in effect, that the only obligation imposed on them by that covenant is to take all reasonable steps to win, work, and get the coal. I cannot so read the covenant. It seems to me to be a covenant to win, work, and get the coal; and to do so fairly, duly, and honestly.

If that be the true construction of the covenant, the only remaining question appears to me to be as to the measure of damages. The general rule is that the damages for breach of a covenant should be such as will, as nearly as possible, put the covenantee in as good a pecuniary position as if the covenant had been performed. It appears from the finding of the arbitrator that there is considerable uncertainty as to the amount of coal that could have been got in this case. He has found that in all probability the amount which would have been got, if the coal had been worked, is four and a half acres, and he has assessed the damages, alternatively, on that basis. It seems to me that the amount so arrived at is the correct measure of damages in this case.

MATHEW L.J. I am of the same opinion, and have little to add. In this case a lease for twenty-one years was entered into, by which the owners of certain land demised to the proprietors of collieries in the neighbourhood so much and such part of a seam of coal called the Haigh Moor seam as lay within and under their land. The lessees must be taken to have satisfied themselves before entering into the contract that coal existed beneath the surface of those lands. Of course this was speculative, as all such contracts must be. Having so satisfied themselves, they entered into the covenant in question; and, in my opinion, they must be held to have taken upon themselves the risk of their being unable to perform it profitably. It is contended that, because it has turned out that they cannot fulfil the covenant to win the coal without incurring heavy pecuniary loss, they are entitled to throw up the lease altogether. In my opinion that contention is wholly

untenable. I agree with the view taken by the Master of the Rolls and Stirling L.J. as to the damages.

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Appeal allowed.

Solicitors for appellants: *T. B. & W. Nelson, for Nelson, Eddisons & Lupton, Leeds.*

Solicitors for respondents: *Clements, Williams & Co., for Brown, Wilkin & Scott, Wakefield.*

E. L.

IMPERIAL AND GRAND HOTELS COMPANY, LIMITED *v.* CHRISTCHURCH GUARDIANS.

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Poor-rate — Appeal — Notice of Objection — Time — Poor Relief Act, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Act Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

By the Poor Relief Act, 1743, s. 4, it is enacted that any person aggrieved by any rate may appeal to the next quarter sessions.

The Union Assessment Committee Act Amendment Act, 1864, s. 1, provides that "no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by the assessment committee unless he shall have given notice of objection against the said list and shall have failed to obtain . . . . relief . . . .; and which objection after notice given at any time . . . . the committee shall hear . . . ."

The appellants during the currency of a rate gave notice of objection against the valuation list, and, having failed to obtain relief from the assessment committee, appealed to the quarter sessions held next after the decision of the committee. Two meetings of the committee and one Court of quarter sessions had been held after the making of the rate and before the notice of objection was given:—

Held, that the notice of objection having been given during the currency of the rate, and it not having been proved that the appellants had been guilty of unreasonable delay, the appeal to quarter sessions was in time.

CASE stated by the Recorder of Bournemouth.

At the Court of quarter sessions held in and for the borough of Bournemouth upon January 2, 1904, the Imperial and Grand Hotels Company, Limited, appealed against a rate made

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by the overseers of the parish of Bournemouth in the Christchurch Union upon April 21, 1903, the appellants (1) having objected to the valuation list before a meeting of the assessment committee of the respondent union held upon November 12, 1903, and failed to obtain relief thereat as required by s. 1 of the Union Assessment Committee Act Amendment Act, 1864 (27 & 28 Vict. c. 39). When the said appeal was called on for hearing, counsel for the respondents objected that the Court had no jurisdiction to hear the appeal, inasmuch as the appellants had not appealed to the next quarter sessions for the borough as required by s. 4 of the Poor Relief Act, 1743 (17 Geo. 2, c. 38).

The following admitted facts were relied upon by counsel for the respondents in support of their objection :—

The rate appealed against was made upon April 21, 1903, to provide for expenses to be incurred before March 31, 1904, payable by two equal instalments, the first payable on May 1, 1903, and the second on November 1, 1903.

The assessment committee of the respondent union held meetings for the purpose of hearing objections to the valuation list, of which due notice was given, upon May 15, August 13, and November 12, 1903.

Courts of quarter sessions were held upon June 27 and October 27, 1903.

The appellants first gave notice of objection to the valuation list on which the rate was based on October 26, 1903, and the said objection was heard by the assessment committee at their meeting held on November 12, 1903.

The appellants on December 5, 1903, gave due notice of appeal to the quarter sessions to be holden on January 2, 1904.

The appellants had paid the first instalment of the rate which became payable on May 1, 1903, in the month of August, 1903, before they gave the said notice of objection to the valuation list.

The recorder overruled the objection, being of opinion that in the circumstances above stated the appeal was made to

(1) The terms appellants and respondents are used throughout with reference to the position of the parties at sessions.

the next quarter sessions for the borough within the meaning of the Poor Relief Act, 1743, s. 4, and the Union Assessment Committee Act Amendment Act, 1864, s. 1.

Having heard the appeal on the merits upon January 2, 1904, the recorder delivered judgment therein on April 12, 1904, in favour of the appellants, with costs, and ordered that the gross estimated rental of the Imperial Hotel be reduced from 1500*l.* to 1325*l.*, and that of the Grand Hotel from 2050*l.* to 1530*l.*, but inasmuch as the appellants had not taken steps, as they might have done, to appeal against the rate at an earlier date, the recorder ordered that the alteration of the assessment should only operate in respect of the second instalment of the rate, and refused to order that the excess paid by the appellants in respect of the first instalment should be refunded to them or allowed off the second instalment.

Counsel for the appellants contended that the recorder was bound to order that the excess paid by the appellants in respect of the first instalment should be refunded. The recorder, however, refused to vary his order.

The questions for the Court were:—

(1.) Whether the recorder was right in holding that the appellants were not out of time in bringing their appeal, and that he had jurisdiction to hear their said appeal.

(2.) If the answer to the first question be in the affirmative, whether the recorder was right in ordering that the alteration made by him in the rate should only apply to the second instalment thereof.

If the answer to the first question were in the negative, the appeal against the rate was to be dismissed and judgment was to be entered for the respondents.

If the answer to the second question were in the affirmative, the order to stand; if in the negative, the order to be varied and the Court was to make such order as the Court should think fit.

Ryde and *Francke*, for the respondents. Under s. 4 of the Poor Relief Act, 1743, an appeal against a rate must be made to the next quarter sessions after the making of the

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rate. That has been construed to mean the next practicable quarter sessions. Then, by s. 1 of the Union Assessment Committee Act Amendment Act, 1864, it is provided that there shall be no appeal to sessions unless the appellant shall have given notice of objection to the assessment committee and shall have failed to obtain relief. The effect of those two sections read together is that in considering what are the next practicable sessions regard must be had to the fact that an appellant before coming to quarter sessions has first of all to go before the assessment committee. In the present case a meeting of the committee was held on May 15, and it is not suggested that the appellants could not have given their notice of objection in time for that meeting. If they had done so, the appeal could have been brought to the quarter sessions held on June 27. Those sessions must, therefore, be taken to be the next practicable sessions after the making of the rate. The recorder had, therefore, no jurisdiction to hear the appeal at the January sessions. The appellants will rely on the provision in s. 1 of the Act of 1864, that the notice of objection may be given "at any time," the contention being, it would seem, that the effect of those words is that a rate can, since that Act, be appealed against at any time, even ten years, after it has been made. This is tantamount to saying that the Act of 1864 has repealed so much of s. 4 of the Act of 1743 as enacts that the appeal shall be to the next quarter sessions. That this is not so is abundantly clear from the authorities. The words "at any time" were introduced into s. 1 of the Act of 1864 for a totally different purpose. The assessment committee was brought into existence by the Union Assessment Committee Act, 1862. That Act, while leaving unaffected the old right of appeal to sessions, provided for notice of objection to the valuation list to be made to the assessment committee, and the committee, after hearing the objection, was empowered to make alterations and corrections in the list, and the list when approved by the committee remained in force until a new list was made (s. 24). A difficulty arose under the Act, because under s. 18 the notice of objection had to be given within twenty-eight days of the notice of deposit of the list

and, if that time had elapsed and the time for appealing to quarter sessions had passed, a person aggrieved had no means of redress, although it might be the case that he was not in occupation of his premises at the time the list was made, and therefore could not have objected to the list or appealed; and as valuation lists were only made at irregular intervals, he might remain for years subject to an erroneous valuation. It was solely for the purpose of meeting that difficulty that the Act of 1864 introduced the words "at any time," and thus did away with the necessity for a twenty-eight days' notice of objection.

[The following cases were referred to: *Reg.* v. *Great Western Ry. Co.* (1); *Reg.* v. *Biggleswade Union* (2); *Liverpool Gas Co.* v. *Everton* (3); *Reg.* v. *Wiltshire Justices* (4); *Reg.* v. *West Riding Justices.* (5)]

Clavell Salter, K.C., and *Haydon*, for the appellants. The reason why the appeal to quarter sessions under the Poor Relief Act, 1743, had to be brought to the next practicable quarter sessions after the making of the rate was that the Act gave a general right of appeal to every person aggrieved by the rate, and the making of the rate was the grievance of which the appellant complained. The Act of 1862 enabled the assessment committee to give relief in the matter of over-valuation; but with regard to the current rate, the remedy was still by appeal to quarter sessions. Sect. 1 of the Act of 1864 deals with two matters: first, procedure; and, secondly, the right of appeal. The direct right of appeal to sessions is taken away, and notice of objection must in every case be first given to the assessment committee, and the committee is empowered, not only to deal with the question of valuation, but also to give relief against the current rate. If the decision of the committee is in favour of the appellant, there is no necessity for any appeal to the quarter sessions. As there is no right of appeal until there has been a refusal of relief by the committee, the grievance in respect of which the appeal lies is, since the

(1) (1874) 38 J. P. 822.
(2) (1869) 21 L. T. 494.
(3) (1871) L. R. 6 C. P. 414.
(4) (1879) 4 Q. B. D. 326.
(5) (1858) E. B. & E. 713.

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Act of 1864, not the making of the rate, but the decision of the committee; and it follows, therefore, that if the appeal is brought to the next practicable quarter sessions after that decision it is in time: *Reg.* v. *Biggleswade Union.* (1) The Act of 1864 expressly provides that the notice of objection to the committee may be given "at any time." The reference to the current rate in the latter part of s. 1 shews that "at any time" means at any time during the currency of the rate.

With regard to the second question, there is no power to refuse to order the repayment of the excess of the first instalment of the rate: see the Poor Rate Act, 1801 (41 Geo. 3, c. 23), s. 8.

Ryde, in reply, referred to *Rex* v. *Sussex Justices* (2) and *Reg.* v. *Surrey Justices.* (3) He admitted that the decision on the second question could not be supported.

Cur. adv. vult.

Nov. 18. The judgment of the Court (Lord Alverstone C.J., Kennedy and Ridley JJ.) was read by

LORD ALVERSTONE C.J. This is an appeal on a case stated from a decision of Mr. Kinglake, the Recorder of Bournemouth, and raises a question of some difficulty under the Poor Relief Act, 1743, and the Union Assessment Committee Act, 1862, and the Amendment Act, 1864.

The rate appealed against was made on April 21, 1903, to provide for expenses up to March 31, 1904, and was payable by two instalments, one on May 1 and the other on November 1, 1903. Meetings of the assessment committee were held on May 15, August 13, and November 12. Courts of quarter sessions were held on June 27 and October 27. The first notice of objection was given by the appellants to the assessment committee on October 26; the objection was heard and determined on November 12, and the notice of

(1) 21 L. T. 494. (2) (1812) 15 East, 206; 13 R. R. 447.
(3) (1880) 6 Q. B. D. 100.

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appeal to the sessions held on January 2, 1904, was given on December 5, 1903. The appellants in the month of August, 1903, paid the first instalment due on May 1. Objection was taken to the jurisdiction of the recorder upon the ground that the appeal to the January quarter sessions was too late, not having been brought to the next quarter sessions within the meaning of s. 4 of 17 Geo. 2, c. 38.

It is clear from the authorities, and in fact it is not disputed, that up to the passing of the Union Assessment Committee Act Amendment Act, 1864, the appeal would have been too late. There are numerous authorities which establish that an appeal against a rate must be brought at the next practicable sessions at which an effectual appeal could be lodged: *Rex* v. *Sussex Justices* (1), *Reg.* v. *West Riding Justices* (2), and numerous other cases. Sect. 1 of the Union Assessment Committee Act Amendment Act, 1864, provides that no person shall be allowed to appeal against a poor-rate unless he shall have given to the assessment committee notice of objection against the valuation list, and shall have failed to obtain such relief in the matter as he deems just. And the section further provides that, "After notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear [such objection] with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly." It was contended on behalf of the respondents that the proviso to this section which makes it a condition precedent to an appeal, that an appellant shall have given notice of objection to the assessment committee, and shall have failed to obtain relief, had not affected the duty of the appellant under s. 4 of the Act of 1743 of bringing his appeal to the next practicable sessions after the publication of the rate, and that inasmuch as the appellants had taken no steps until October 26 and had allowed the meetings of the assessment

(1) 15 East, 206; 13 R. R. 447. (2) E. B. & E. 713.

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committee of May and August to go by, and that no explanation was given to account for the delay, the appellants had failed to comply with the provisions of the Act of 1743. It was further contended that, inasmuch as the recorder had found that the appellants had not taken steps which they might have taken to object to the rate at an earlier date, he had, in effect, decided that the delay in going to the assessment committee and the consequent postponement of the appeal shewed that the appellant had not brought the appeal to the next practicable sessions. There is a great deal of force in this contention, and there is no doubt that the language in some of the judgments which have been given shews that an appellant ought to be prompt in raising objections. For instance, Bovill C.J., in *Reg.* v. *Biggleswade Union* (1), in deciding in favour of an appellant, said that there was nothing to shew that the appellant took more than a reasonable time before taking any step. But we are dealing with the question of jurisdiction. Whatever the true view may be in a case in which it could be proved that, as a matter of fact, the appellants had unreasonably delayed going before the assessment committee and had thereby exceeded the time allowed for appealing, we are unable to say that the recorder had no jurisdiction to entertain this appeal. The Act of 1743 provided that the appellant should appeal to the next general or quarter sessions. These words, as we have already said, have been construed to mean the next practicable sessions. Sect. 1 of the Act of 1864 contains no similar direction or limitation. Reliance was placed by the appellants, the Imperial and Grand Hotels Company, upon the words in s. 1 of the Act of 1864, "at any time," following the words "after notice given," but we doubt whether that argument is entitled to much weight, because those words were undoubtedly necessary in order to extend the limit of twenty-eight days during which, under s. 18 of the Union Assessment Committee Act, 1862, a person could object to the valuation list, and also to give the committee power to alter the list notwithstanding approval under

(1) 21 L. T. 494.

the same Act. But, apart from this argument, the section contains no direction or limitation similar to that contained in the Act of 1743, that the appellant shall lodge his objection before the next or any particular meeting of the assessment committee; and, looking to the practical working of the matter, we think it quite possible that the Legislature recognised that these objections could not be dealt with as speedily as appeals against poor-rates under the old law, especially having regard to the extended powers of objection which were conferred by the Union Assessment Committee Acts of 1862 and 1864. Further, the power of the committee to alter a current rate would seem indirectly to limit the time within which objections can be effectively taken. We express no opinion as to what may be the true view to be taken in a case in which the whole period for which the rate was made was allowed to go by, or where, as we have said, persons have been guilty of unreasonable delay in giving notice of their objections. But we are unable to say in this case, in which the objection was lodged and determined and the appeal brought within the period of the current rate, that the jurisdiction of the Court of quarter sessions was ousted because the appellant might have lodged his objection at one of two earlier meetings of the assessment committee. Upon the whole, therefore, we are of opinion that the recorder was right in hearing the appeal and in declining to give effect to the preliminary objection. The other point raised in the case must, in our opinion, be answered in favour of the hotel companies. The recorder, having reduced the rateable value from 1500*l.* to 1325*l.* in the one case and from 2050*l.* to 1530*l.* in the other, ordered that the order for the repayment of the excess should only operate in respect of the second instalment of the rate, and should not apply to the first instalment which the hotel companies had paid in August. Assuming that he could entertain the appeal as we have already decided, he was bound, having regard to the provisions of s. 8 of the Poor Rate Act, 1801 (41 Geo. 3, c. 23), to order repayment in respect of the whole rate. We therefore think that the appeal of the respondent union must be dismissed, with costs, and the order varied as above directed, and

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the appeal of the Imperial and Grand Hotels Company should be allowed, with costs.

Appeal of the respondents dismissed.
Appeal of the appellants allowed.

Solicitors for respondents: *Lovell, Son & Pitfield, for Druitt & Druitt, Christchurch.*

Solicitors for appellants: *C. F. Ingram, for C. Lacey, Bournemouth.*

F. O. R.

C. A.

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Nov. 7.

[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* EARL OF LONDESBOROUGH.

Revenue—Estate Duty—Exemption—Settlement of Personal Property—Trust for Conversion into Realty—Payment of Probate Duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 1.

By the Finance Act, 1894, s. 21, sub-s. 1, "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property" probate duty (among other specified duties) "has been paid, or is payable, unless . . . . the deceased was, at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

Under the will of a testator, who died in 1849, his residuary personal estate became vested in trustees upon trust to invest it in land, and to settle the land to the use of two persons in succession for life, with remainders over in tail male. Probate duty was paid on the testator's personal estate, and the residue of the same was invested in land, which was settled in accordance with the directions of the will. On the death of the second tenant for life in 1900, the Crown claimed estate duty in respect of the land:—

Held, that the estate duty claimed was not payable, the case coming within the exemption created by the above-mentioned sub-section.

APPEAL from the judgment of Channell J. upon an information by the Attorney-General claiming estate duty.

The facts, as appearing from the information and answer, are fully stated in the report of the case in the Court below (1),

(1) [1904] 1 K. B. 749.

but for the purposes of this report they may be stated as follows :—

By will dated August 3, 1848, William Joseph Denison devised all his real estate to the use of his nephew, Lord Albert Denison Conyngham, for his life, with remainder to the use of William Henry Forester Conyngham, the eldest son of his said nephew, for his life, with remainder to the use of the first and every other son of the last named, severally, successively, and in remainder one after another, in tail male, with divers remainders over; and the testator by his said will bequeathed all his personal estate, not thereby otherwise disposed of, to trustees upon trust to convert the same into money, and, after payment of debts and legacies, to invest the residue of the money in the purchase of real estate, and to settle the same upon the same uses as were in the will expressed concerning the testator's real estate.

The testator died on August 3, 1849, and his will was duly proved, and probate duty was paid. The trustees of the will invested the residue of the personal estate in the purchase of hereditaments, which were duly conveyed to the uses of the testator's will. In 1850 the first tenant for life under the will was created Baron Londesborough, and on January 15, 1860, he died. His eldest son, the said William Henry Forester Conyngham, thereupon succeeded to the title of Baron Londesborough, and also as tenant for life to the estates devised by and subject to the uses and trusts declared by the testator's will, including the estates purchased with the residuary personalty of the testator. The defendant was the eldest son of the second Lord Londesborough. On May 18, 1886, a disentailing deed and a deed of resettlement, to both of which the defendant and his father were parties, were executed, by which certain real estate, including the estates purchased with the residuary personalty of the testator, was resettled in trust for the defendant's father for life by way of continuation and confirmation of the former life estate limited to him by the will, and, after his death, as to one part for the defendant for life and then for his first and other sons in tail male, and, as to the other part, for the defendant in fee simple. The

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second Lord Londesborough, who had in 1887 been created Earl of Londesborough, died on April 13, 1900, when the defendant succeeded in possession to the estates and title.

The Crown claimed estate duty upon the death of the late Earl of Londesborough in respect of (inter alia) the property which had arisen from the investment in land of personal estate of William Joseph Denison, in respect of which probate duty had been paid as part of his estate. (1)

Channell J. gave judgment in favour of the Crown.

Haldane, K.C., and *Danckwerts*, K.C. (*Bridgeman* with them), for the defendant. Real property was not before 1894 subject to any duty analogous to probate duty; and the object of the Finance Act, 1894, was (inter alia) to place real property and personal property on a footing of equality with regard to death duties, by putting an end to the then existing duties in respect of personalty, and imposing the estate duty in respect of both real property and personalty. But, in so doing, it was also the object of the Legislature to make provision for preventing the possibility in the case of settled property of the same duty being charged more than once in respect of the same settled property. As regards estate duty, the last-mentioned object is carried into effect by s. 5, sub-s. 2, of the Act, which provides that, if estate duty has already been paid in respect of any settled property since the date of the settlement, it is not to be paid again until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of the property. Sect. 21, sub-s. 1, is intended to carry out the same object in cases where probate duty, which was the equivalent of estate duty as regards

(1) By the Finance Act, 1894, s. 21, sub-s. 1, "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid, or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

personalty, has been paid in respect of property settled by the will of a person dying before the commencement of the Finance Act, 1894. The word "personal" in that sub-section is used with reference to the time when the probate duty became payable, not to the death of the "deceased person" mentioned at the commencement of the sub-section. It is quite immaterial, having regard to the object of the sub-section, whether the property has continued to exist in the form of personalty, or has been converted into realty; and it would be a great injustice, and contrary to the general intention of the Legislature that, although the property would be exempt from estate duty, if it remained personal, the accident of its being converted into realty should render it liable to that duty, notwithstanding the fact that an analogous duty, namely, probate duty, had already been paid in respect of what was in substance the same settled property. The general scope of s. 21, sub-s. 1, was explained by Rigby L.J. in *Attorney-General* v. *Dodington* (1) in a manner favourable to the defendant's contention; and this exposition of its meaning was followed by Palles C.B. and by the Court of Appeal in Ireland, in *In re Studdert* (2), and was approved by the House of Lords on appeal from that decision in *Attorney-General* v. *Priestley*. (3) The use of the words "in respect of" in s. 21, sub-s. 1, instead of the word "on," affords some slight corroboration of the view that it was not intended, by the use of the word "personal" in the section, to limit its application to property which remains in the form of personalty at the time when the question of liability to estate duty arises. The words are, "in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act." That must mean property which is personal at the time when the settlement is made.

Sir R. B. Finlay, *A.-G.* (*Sir E. Carson*, *S.-G.*, and *Vaughan Hawkins* with him), for the Crown. The question in this case depends entirely on a few words in s. 21, sub-s. 1, of the Act. It is submitted that the sub-section cannot be construed as suggested by the defendant. The point raised by the present

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373, at p. 383.

(2) [1900] 2 I. R. 281, 400.

(3) [1901] A. C. 208.

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case did not arise either in *Attorney-General* v. *Dodington* (1) or in *In re Studdert* (2), and what was said in those cases cannot therefore conclude the present. It cannot be denied that estate duty is payable in this case under the words of s. 1 of the Finance Act, 1894, unless the case comes within the words of s. 21, sub-s. 1. It may be admitted that, as was held in *Attorney-General* v. *Dodington* (1), to some extent the object of that sub-section, as well as that of s. 5, sub-s. 2, was to relieve against the imposition of double duty, but the question remains whether the words of s. 21, sub-s. 1, are capable of a construction which will include the present case. It is a general rule of construction that effect ought, if possible, to be given to all the words of an enactment; and the construction contended for by defendant gives no effect to the word "personal" in the sub-section. If it be read as referring to the time at which the settlor died and probate duty was paid, it has no effect, for the duties mentioned in the sub-section, such as probate duty, are only payable on personalty. It is submitted that the obvious construction of the sub-section is that it only exempts from estate duty certain "personal" estate, i.e., settled personal estate on which an analogous duty has been paid, or is payable, under previous Acts. The word "personal" must have reference to the time when the claim for estate duty arises. It is a very forced construction to say that the sub-section has the effect of exempting settled property which is not personal but real, because it has been purchased with the proceeds of sale of property which was personal, and in respect of which probate duty was paid.

Danckwerts, K.C., for the defendant, in reply.

COLLINS M.R. This is an appeal against a judgment of Channell J. in a case which arises under the Finance Act, 1894. As the Attorney-General has said, the question turns on a very few words in s. 21, sub-s. 1, of the Act. I think, however, that those words are such as to render it competent for us to construe them in this case in a manner consistent with what is admitted on all hands to be the general intention

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373. (2) [1900] 2 I. R. 281, 400.

of the Act. The question arises in respect of a claim by the Crown to estate duty upon the death of a tenant for life under a will. By that will the original settlor devised his real estate to two tenants for life in succession with remainders over in tail male, and bequeathed his personal estate, not thereby otherwise disposed of, to trustees, upon trust to convert it into real estate, and settle the same so as to follow the limitations which were expressed in the will concerning his real estate. The settlor died before the Finance Act, 1894, came into operation, and probate duty was paid in respect of his personal estate. Since the coming into operation of the Act the second tenant for life has died, and upon his death the Crown claims estate duty under s. 1 of the Act upon the real estate into which the residuary personalty under the will was converted. That section provides that, "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty, called 'Estate Duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty." Therefore, in this case estate duty is no doubt payable, unless the case comes within the words "save as hereinafter expressly provided"; but, if and so far as express provision has been made to the contrary, the section does not apply. The defendant contends that, by virtue of the saving clause, s. 1 never came into operation with regard to the particular subject-matter here in question. The subsequent exemption clause, by which the defendant says that it has been expressly provided otherwise, is s. 21, sub-s. 1. That sub-section provides that, "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the First Schedule to this Act" (which includes

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probate duty) "or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." In this case it is contended that, the probate duty having been paid in respect of the settled property at the death of the testator, exemption from estate duty is conferred by the sub-section. That sub-section is one provision indicating an intention on the part of the Legislature that what is substantially the same duty should not be payable in respect of the same settled property more than once. There is another sub-section indicating a similar intention in a case where other circumstances require an analogous exemption. Sect. 5, sub-s. 2, provides that, "If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property." Therefore, when the estate duty has been once paid in respect of settled property, it cannot again become payable in respect of that property, until there is a devolution of it upon the death of some person who was at the time of his death, or had been during the continuance of the settlement, competent to dispose of the property. Both these sub-sections were apparently introduced for the purpose of preventing what the Legislature seem to have regarded as an injustice. As regards cases where, as in the present case, probate duty had before the Act been paid on property settled under a will, the attention of the Legislature seems to have been awakened to the injustice that would arise, if, that duty, which was the equivalent under the previous legislation of estate duty, having been paid, another duty of substantially the same character were exacted upon the death of the owner of a limited interest in the same property. So this sub-section was introduced, the plain object

of which is to prevent that injustice. For the view that this was the scope of the sub-section we have the highest authority in the observations of Rigby L.J. in the case of *Attorney-General* v. *Dodington* (1), which followed those of Vaughan Williams J. in the same case in the Court below, and which were followed in the Irish case of *In re Studdert.* (2) The principle so laid down with regard to the intention of the Legislature in passing s. 21, sub-s. 1, was approved by the House of Lords on appeal from the Court of Appeal in Ireland in *Inland Revenue Commissioners* v. *Priestley* (3), and therefore cannot now be disputed. The passage in which Rigby L.J. stated that principle is as follows: "My conclusion is that in the present case the defendant brings himself within the very words of the sub-section, and I entertain no doubt that his case comes within the intention of the Legislature in framing it. I think that their intention looked at broadly was that in the case of settled property, where probate duty has once been paid or become payable in respect of the interest of the settlor in it, that should be as effectual for the purpose of exempting the property from payment of the estate duty, as under s. 5, sub-s. 2, the fact that estate duty has once been paid on settled property is for the purpose of preventing a second duty from being payable. It was felt that the case of property in settlement required great consideration, and that it would be a hardship in the case of such property that, when estate duty had once become payable in respect of it, it should again be payable on the lapse of each life, and that the same consideration applied to the case of settled property on which probate duty had once been paid or become payable. Accordingly the one case is provided for by s. 5, sub-s. 2, of the Act, and the other by s. 21, sub-s. 1." The principle so laid down may have gone somewhat beyond what was absolutely necessary for the decision in the particular case, but it justified that decision; and, as I have said, it has been approved in the House of Lords. The principle seems to be that, if the equivalent of estate duty has once been paid in respect of settled property,

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373, at p. 383.
(2) [1900] 2 I. R. 281, 400.
(3) [1901] A. C. 208.

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the duty is not to be payable again in respect of the same subject-matter; and it appears to me that the fact that, since the payment of the probate duty, the property has changed its form from that of personalty into that of realty cannot affect the application of the principle. The intention of the Legislature having been to remedy what, as it appeared to them, would be an injustice, I think we ought, if possible, to attribute to them the intention to remedy that injustice fully and in every case in which it might arise. This being the general principle, I agree that we cannot give effect to it in this case, unless the words of the Act permit us to do so. If the words were such that by no reasonable interpretation they could be made to apply in a particular case, of course we should be bound to say that in that case there was no remedy. But, when one comes to criticize the words here in question, I think that, without unduly straining them, they are quite consistent with an interpretation which will prevent in the present case the injustice which it was the general intention of the Legislature to prevent. Sect. 21, sub-s. 1, provides that estate duty shall not be payable on the death of a deceased person in respect of a particular subject-matter, namely, "personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act in respect of which" (inter alia) probate duty "has been paid, or is payable, unless the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." I think the property here in question comes within that description fairly construed. There appears to me to be some force in Mr. Danckwerts' suggestion that the expression "in respect of" was probably selected deliberately, instead of the word "on," as being a rather more apt expression to use for the purpose of conveying what he contended to have been the intention of the Legislature in this sub-section. The point of time which was material in the view of the framer of the sub-section was not, I think, the death of the person on whose decease the claim of the Crown for estate duty might arise, but the point of time at which the particular property in

question became subject to probate duty, i.e., the death of the original settlor. The exemption given by the sub-section appears to me to have been intended to apply to any property in respect of which, as being personal property at the time of the settlor's death, probate duty was paid, no matter what the form of that property might be at the time when the question of the liability to estate duty arose. I do not find any great grammatical difficulty in placing that construction on the words of the sub-section. This property was certainly "personal property settled by a will made by a person dying before the commencement of this part of this Act, in respect of which property" probate "duty had been paid"; and therefore it appears to me to fulfil all the conditions required by the sub-section. In my opinion it is not essential that the property should continue to exist in the form of personal property at the death of the person on whose decease the claim for estate duty is made. No doubt, if the word "personal" had not been inserted in the sub-section, the case would have been plainer; but I do not think that its presence constitutes an insuperable difficulty in the way of the construction contended for by the defendant. The fact that the probate and account duties mentioned in the sub-section are duties payable on personal property seems to me sufficiently to account for the introduction of the word "personal" in describing the subject-matter to which the sub-section was to apply, although that word may really have been unnecessary. I do not think that it would be right on account of the existence of that word in the sub-section to construe it so as to defeat in this case what seems to me plainly to have been the intention of the Legislature. I think we ought to give full effect in this case to what is undoubtedly the general scope of the enactment, unless we are driven by grammatical exigencies to do otherwise, which, as I have already said, does not appear to me to be the case. For these reasons I think the appeal must be allowed.

STIRLING L.J. I agree with the reasoning of the Master of the Rolls, and will only add a word or two. Sect. 22, sub-s. 1 (*f*),

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of the Finance Act, 1894, provides that the expression "property" shall include "real property and personal property, and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale." The question is whether in this case an exemption from estate duty is conferred by s. 21, sub-s. 1. That sub-section provides that "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property" any of certain duties, one of which is probate duty, "has been paid or is payable, unless . . . . the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property." Regard being had to the definition of "property" given by s. 22, sub-s. 1 (*f*), it seems to me that we may treat the words "personal property" in s. 21, sub-s. 1, as including not only property which is personalty at the time of the death of the person on whose decease the question as to estate duty arises, but also property which is an investment for the time being representing the proceeds of sale of property which was personalty at the time when the settlor died, and probate duty was paid or became payable in respect of it. In this case personal estate was bequeathed to trustees on trust to convert the same into real estate, and probate duty was paid on that personalty. The personalty was sold, and the proceeds of sale were applied in the purchase of land, which was afterwards settled upon the limitations of the will and is now held subject to those limitations. It appears to me that that real estate is an investment which at the death of the second tenant for life represented for the time being the proceeds of sale of the personal property in respect of which probate duty had been paid. The contention for the Crown is that, in order that the exemption given by s. 21, sub-s. 1, may apply, the claim for estate duty must be made in respect of personal estate which exists as such at the time when the claim is made. It appears to me that this construction unduly limits the operation of the sub-section. For example, suppose that the trust in the will

had not been for the conversion of the personal estate into realty, but there had been a trust for sale and investment of personal estate either in land or Consols, and to hold the investment or investments so made in trust for successive tenants for life, and, on the death of the last tenant for life, on trust for sale and distribution among persons indicated in the will; so that there was a binding ultimate trust for reconversion into personalty of what might for the time be invested in realty. In the eye of a Court of Equity that property would be personalty; but, on the strict construction of the sub-section contended for by the Crown, what would be the effect upon it of s. 21, sub-s. 1? If the trust fund had been invested, half in land and half in Consols, according to that construction, the exemption would apply to the half invested in Consols, and not to the half invested in land; or, if the whole of the fund had been invested in Consols, the exemption would apply to the whole, but, if the whole had been invested in land, the exemption would have no operation with regard to it. I do not think that would be a probable intention to ascribe to the Legislature, and it would be quite inconsistent with the general scheme of the Act as indicated by Rigby L.J. in *Attorney-General* v. *Dodington*. (1) If the language of s. 21, sub-s. 1, is such as to enable us to give effect in this case to what appears to have been the general intention of the Legislature in framing that sub-section and s. 5, sub-s. 2, I think we ought to do so. For these reasons I think that the words "personal estate" in s. 21, sub-s. 1, ought not to be treated as limiting the operation of the sub-section in the manner contended for by the Crown.

MATHEW L.J. I agree with the judgments of the Master of the Rolls and Stirling L.J., and with the reasons given by them. It is sought to narrow the application of s. 21, sub-s. 1, of the Act by reference to the word "personal," which occurs in that sub-section. In my opinion that word is really surplusage, and might be struck out of the sub-section. If it were struck out, it is admitted that there would be no

(1) [1897] 2 Q. B. 373, at p. 383.

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difficulty in construing the sub-section so as to include the present case. The property to which the sub-section refers must originally have been "personal," because only personalty was subject to probate duty. The word "personal" appears to me to be used in the sub-section merely as being a correct description of the property contemplated in reference to the time at which that duty became payable. It is, therefore, in my opinion, possible to give that word a reasonable meaning without narrowing the operation of the sub-section as suggested, or giving to it an interpretation which would work injustice in cases like that with which we are dealing.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Royds & Rawstorne.*

E. L.

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[IN THE COURT OF APPEAL.]

THOMPSON, APPELLANT; THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF ECCLES, RESPONDENTS.

HAEDICKE *v.* THE FRIERN BARNET URBAN DISTRICT COUNCIL.

Local Government—Drain or Sewer—Pipe draining several Houses belonging to different Owners—Single Private Drain—Nuisance existing on Land of one Owner—Notice to abate Nuisance—Notice to other Owners—Apportionment of Expenses—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain-pipe passing through private property, and receiving and conveying to a public sewer the drainage of several houses belonging to different owners, is a "single private drain" within the meaning of s. 19 of the Public Health Act, 1890. A notice to the owner of one of the houses on whose land a nuisance, arising from the defective state of such a drain-pipe, is found to exist, to abate the same and to execute certain works for that purpose, is a sufficient notice to throw upon him the duty of abating the nuisance, and, upon his default, to entitle the local authority to recover from him the expenses incurred by them in so

doing. In such a case no notice need be given to the other owners, and the provisions of s. 19 of the Act as to apportionment of the expenses incurred by the local authority in executing the necessary works are not applicable.

Bradford v. *Eastbourne Corporation*, [1896] 2 Q. B. 205, approved.

Thompson v. *Eccles Corporation*, [1904] 2 K. B. 1, and *Haedicke* v. *Friern Barnet Urban Council*, [1904] 2 K. B. 807, overruled.

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HAEDICKE v. FRIERN BARNET URBAN COUNCIL.

APPEALS from the judgment of a Divisional Court, reported [1904] 2 K. B. 1, and from the judgment of Channell J., reported [1904] 2 K. B. 807.

THOMPSON *v.* ECCLES CORPORATION.

This case came before the Divisional Court on a case stated by justices, which is set out in the report of the case in the Court below.

The circumstances were that within the borough of Eccles there were two blocks of six houses each, belonging to one Edward Johnson. There was a 6-inch pipe which passed through and under these houses, and received the drainage from each of them. In continuation of this pipe there was a 9-inch pipe running through and under the cellars of seven houses belonging to the appellant Thompson. This pipe received the drainage of those seven houses, as well as that conveyed by the 6-inch pipe, and discharged into a main sewer of the respondent corporation. Both the 6-inch and the 9-inch pipes were laid through private property until the main sewer was reached. Complaint was made to the respondents that the drain or sewer under one of the appellant's houses was a nuisance and injurious to health, and on examination it was found to be in bad condition, and to require alteration or amendment. The respondents served upon the appellant a notice requiring him to do certain works which were necessary for the purpose of abating the nuisance, and upon his making default in so doing they preferred a complaint against him under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Act, 1890, charging that he had made default in complying with the requisitions of the notice. At the hearing of the complaint the justices found that the pipe in question was used by two or more houses belonging to different

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owners, and was a single private drain within the meaning of s. 19 of the Public Health Act, 1890, and they made an order upon the appellant to abate the nuisance, and to do any works necessary for that purpose. Upon the request of the appellant a case was stated for the opinion of the High Court, and upon argument judgment was given for the appellant. (1)

The corporation appealed.

Macmorran, K.C., and *C. Fleetwood Pritchard*, for the corporation. The pipe in question was a "single private drain" within the meaning of the Public Health Act, 1890, s. 19. It satisfied all the requirements of the section, because it was a drain situated on private property, and it connected with a public sewer more than two houses belonging to different owners. It cannot be essential under the section that each house drained should have a different owner. There is no doubt that this pipe was a sewer and not a drain, according to the definitions of "sewer" and "drain" given by the Public Health Act, 1875: *Travis* v. *Uttley*. (2) But the Public Health Act, 1890, s. 19, must be taken to have modified the definition given by the Act of 1875 for the purposes of s. 41 of that Act. It is not necessary to say that it has done so for other purposes. The decisions on the subject are conflicting. In *Self* v. *Hove Commissioners* (3) a drain like that in the present case was held to be a "single private drain" within s. 19 of the Act of 1890. In *Hill* v. *Hair* (4) it was held with regard to such a drain that s. 19 could not be construed as having altered the definition of "sewer" in the Public Health Act, 1875, retrospectively so as to turn a drain which had already vested in the local authority as a sewer into a private drain. It is impossible to reconcile those two decisions. In *Bradford* v. *Eastbourne Corporation* (5), after time taken for consideration, the Divisional Court followed *Self* v. *Hove Commissioners* (3), and disapproved of *Hill* v. *Hair*. (4) The effect of the decision in *Bradford* v. *Eastbourne*

(1) [1904] 2 K. B. 1.
(2) [1894] 1 Q. B. 233.
(3) [1895] 1 Q. B. 685.
(4) [1895] 1 Q. B. 906.
(5) [1896] 2 Q. B. 205.

Corporation (1) is that, where there is a pipe draining two or more houses belonging to different owners, which is on private property, and to which therefore the public cannot have access without the consent of the owners, that may be treated as a single private drain. It is submitted that that decision was right and ought to be followed. In *Reg.* v. *Hastings Corporation* (2) it was held that the fact that the local authority might have proceeded under powers similar to those given by s. 41 of the Public Health Act, 1875, against the owner of a single private drain which was a nuisance did not relieve them from liability to a mandamus to repair it as being a sewer. In *Seal* v. *Merthyr Tydfil Urban Council* (3), *Bradford* v. *Eastbourne Corporation* (1) was followed, and *Hill* v. *Hair* (4) was questioned. It may be admitted that this pipe is a "sewer" for the general purposes of the Public Health Act, 1875, in the sense that the local authority may be responsible towards the public for its being in a proper condition, but it is not at all inconsistent with that being so that it should be a single private drain for the purposes of s. 19 of the Public Health Act, 1890, so as to give to the local authority power to take proceedings in respect of it under s. 41 of the Public Health Act, 1875. It is of course very anomalous, and may in many cases lead to absurd results, that the applicability of s. 19 should depend upon the houses drained belonging to different owners, but the explanation probably is that the framers of the section erroneously supposed that, under the then existing law, in cases where the houses all belonged to one owner, the drain was a private drain and not a sewer.

G. Rhodes, for the owner. The provisions of s. 19 of the Act of 1890 have no application to the present case, because the pipe in question does not drain two or more houses belonging to different owners. The 6-inch pipe, which drains the two blocks of houses belonging to Johnson, is beyond all question a "sewer" within the Public Health Act, 1875, and not a "single private drain" within s. 19 of the Act of 1890, because all the houses down to that point belong to

(1) [1896] 2 Q. B. 205.
(2) [1897] 1 Q. B. 46.
(3) [1897] 2 Q. B. 543.
(4) [1895] 1 Q. B. 906.

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the same owner, namely, Johnson. Below the point at which the 9-inch pipe begins, all the houses belong to Thompson, the appellant; therefore that pipe cannot be treated as a single private drain within s. 19, because the houses drained by it do not belong to different owners. It is submitted that, in order that that section may apply, the houses must all belong to different owners. In *Bradford* v. *Eastbourne Corporation* (1) all the houses belonged to different owners, and so also in *Self* v. *Hove Commissioners*. (2) The houses in this case were built in 1875, and plans were previously submitted to the local authority, which would shew how the drainage of the proposed houses was to be carried away. Instead of insisting, as they might have done, on a separate connection between each house and the public sewer, the local authority approved those plans with knowledge that this pipe, when made, would become a sewer, within the definition in the Public Health Act, 1875, which would vest in them and for which they would be responsible. The Act of 1890 is an "adoptive" Act; and it would be unfair, and it can never have been intended, that under such circumstances a local authority should have power by adopting the Act to divest themselves of liabilities already vested, and which they may be said to have deliberately undertaken, and to throw them on private owners. These considerations tend to shew that the decision in *Hill* v. *Hair* (3), namely, that s. 19 of the Act of 1890 could not be intended to apply to drains which were already sewers when it passed, was correct. [He also cited *Heaver* v. *Fulham Borough Council* (4); *Jackson* v. *Wimbledon Urban Council*. (5)]

Macmorran, K.C., in reply.

HAEDICKE *v.* FRIERN BARNET URBAN COUNCIL.

This was an action tried before Channell J. without a jury; the facts are fully stated in the report of the case in the Court below.

The circumstances were that there were in the defend-

(1) [1896] 2 Q. B. 205.
(2) [1895] 1 Q. B. 685.
(3) [1895] 1 Q. B. 906.
(4) [1904] 2 K. B. 383.
(5) [1904] 2 K. B. 359.

ants' district four houses of which the plaintiff was the owner, and sixteen houses belonging to other owners. These houses drained into a pipe which at a date prior to 1890 had been connected by the defendants with a public sewer. The whole of the pipe was on private ground. A nuisance having arisen from an obstruction in the pipe near one of the plaintiff's houses and upon his land, the defendants served on the plaintiff a notice under the Public Health Act, 1875, requiring her to abate the nuisance and to relay the drain. The plaintiff did the work under protest, and sued the defendants to recover the expenses as money paid by her under compulsion which the defendants were compellable to pay. The learned judge held that the money had been paid under compulsion; that the pipe was a single private drain within s. 19 of the Public Health Act, 1890, but that the liability to repair the pipe remained on the defendants unless and until they put in force against the owners of the houses drained by the pipe the procedure under s. 19 of the Act of 1890 and s. 41 of the Act of 1875; and that the defendants not having given notice to all the owners, and not having apportioned the expense among them, had not acted under s. 19. Judgment was accordingly given for the plaintiff.

The defendants appealed.

Clavell Salter, K.C. (*W. H. Duckworth* with him), for the defendants. The first point raised, which is identical with that raised in *Thompson* v. *Eccles Corporation* (1), was rightly decided by Channell J. in favour of the defendants; the pipe was a "single private drain" within the meaning of s. 19 of the Act of 1890. There are two conflicting views as to the meaning of that section, which were supposed to be reconciled when Cave J., in *Seal* v. *Merthyr Tydfil Urban Council* (2), withdrew the view which he had previously expressed in *Hill* v. *Hair* (3), and followed the decision in *Bradford* v. *Eastbourne Corporation*. (4) The first view, which it is submitted is the correct one, is that s. 19 extends the subject-matter of s. 41 of

(1) [1904] 2 K. B. 1.
(2) [1897] 2 Q. B. 543.
(3) [1895] 1 Q. B. 906.
(4) [1896] 2 Q. B. 205.

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the Act of 1875; it creates a class of structure, a pipe, which is in fact enjoyed by individuals for their sole benefit; in effect it adds to the class of structures mentioned in s. 41 in respect of which proceedings may be taken. The meaning of s. 19 was well paraphrased by Channell J. when he said that for the purposes of the section a pipe might be a single private drain notwithstanding that for other purposes it was a sewer. The second view of the section is that it is pure machinery; that it does not extend the subject-matter of s. 41, but deals with one particular and very rare case, namely, where a drain, draining more than one set of premises in the same curtilage belonging to different owners, has to be dealt with, the necessity for the section arising from the fact that under s. 41 there is no power of apportionment. The first view is right, on the language of s. 19, which in sub-s. 3 defines "drain" as including a drain used for the drainage of more than one building; this sub-section does not seem to have been drawn to the attention of the Divisional Court in *Hill* v. *Hair* (1) or in *Thompson* v. *Eccles Corporation*. (2) The real meaning of sub-s. 3 is that, for the purposes of that section, "drain" includes "sewer," and it gets rid of the distinction between the two.

Secondly, the learned judge was wrong in holding that the defendants had not made use of the proper procedure, and that therefore the plaintiff was entitled to recover the money she had been compelled to spend. It cannot be successfully contended that the defendants were in a position to enforce the rights of the public under s. 19 and s. 41 respectively, but took inapt proceedings for their enforcement. The essential point in such a contention is that no apportionment of expenses was made by the surveyor to bring the case under s. 19; but the answer is that apportionment only arises in cases where the local authority has itself done the work; no apportionment is possible where the owner has himself done the work, which under s. 41 he has a clear right to do. Further, there was no liability on the defendants to repair, and Channell J. was wrong in holding that they were under such a liability. The learned

(1) [1895] 1 Q. B. 906. (2) [1904] 2 K. B. 1.

judge founded his decision on this point on *Reg.* v. *Hastings Corporation* (1); but that case is distinguishable, for there had been no application to the local authority or complaint as to the existence of a nuisance, and the local authority contended that they were not liable to repair, because the pipe was a single private drain. The Court, however, held that as no complaint had been made, s. 41 had not been brought into operation at all, and as the pipe was in the nature of a sewer the local authority were liable to repair it. That decision is not an authority for the proposition that after complaint, notice, &c., under s. 41 the liability to repair is in the local authority. *Self* v. *Hove Commissioners* (2) is a clear authority that the liability to repair is on the owner as soon as the pipe has been shewn to be a single private drain and a complaint has been made bringing the statute into operation.

Macmorran, K.C. (*Colam* with him), for the plaintiff, confined his argument to the second point. Assuming that *Bradford* v. *Eastbourne Corporation* (3) was correctly decided, the pipe, which receives the drainage of several houses, is a sewer, and primâ facie the liability to repair is on the local authority, in whom the sewer is vested, and whose property in the sewer is not divested by the operation of s. 19. Then, the pipe exists for the joint benefit of all the owners, and the intention of s. 19 is that all should contribute to its repair, each being for this purpose responsible for the acts of the others. A joint notice may be served on the owners requiring each of them to do the whole of the requisite work: *Lancaster* v. *Barnes District Council.* (4) The true view of s. 41 is that it requires a notice by the local authority to all the owners, and on their failure to do the work the local authority can recover the expenses from all jointly. The notice must not be in respect of a particular house, but in respect of the drain, which, in the present instance, is a single private drain, and the notice must be given to all the owners of the common property. The alternative is that this pipe was a sewer, in which case the defendants were liable to repair it, or else it was

(1) [1897] 1 Q. B. 46.
(2) [1895] 1 Q. B. 685.
(3) [1896] 2 Q. B. 205.
(4) [1898] 1 Q. B. 855.

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a single private drain, and the expense of repairing it would fall in proportions to be settled by the surveyor upon all the owners. Sect. 41 is applicable to the case of a single owner, and when applied to a group of owners the procedure is applicable to each, and notice must be given to all. [He referred to *Kirkheaton District Local Board* v. *Ainley, Sons & Co.* (1) and *Fordom* v. *Parsons.* (2)]

Clavell Salter, K.C., in reply. Only one form of notice is given in the schedule to the Act of 1875, and that fact seems to shew that ss. 94 to 98 are to be read with s. 41. As to serving notice on all the owners, the duty of the authority is to ascertain where the nuisance exists and what work is required to abate it, and whatever notice is given must be directed to the defect that is ascertained, and must be given to the owner of the land where that defect exists. The notice, therefore, was a good one. *Lancaster* v. *Barnes District Council* (3) is not an authority that separate notices to each of the two owners to do the necessary work on his land would have been bad.

COLLINS M.R. These two appeals raise substantially the same point, though a second point is raised in the second case. The main question is as to the effect of s. 19 of the Public Health Act, 1890, and how far it extends in altering the law as it formerly stood. Sub-s. 1 of that section is in these terms: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a Court of summary jurisdiction"; and by sub-s. 3: "For the purpose of this section the expression 'drain' includes a drain used for the drainage of more than one

(1) [1892] 2 Q. B. 274. (2) [1894] 2 Q. B. 780.
(3) [1898] 1 Q. B. 855.

building." Up to that time a pipe used for the drainage of more than one building was not a drain but a sewer. The subsection, however, contemplates that for the future the expression "drain" was to be applicable where the drain is used for the drainage of more than one building. That being the new condition of things, the section applies to such a case the provisions of s. 41 of the Public Health Act, 1875, which provides (so far as concerns this case) that the local authority, upon complaint made that any drain in their district is a nuisance, may direct an examination, and if the drain, on examination, appears to be in bad condition, or to require alteration or amendment, notice may be given to the owner or occupier of the premises requiring him to do the necessary works. If the notice is not complied with, the person to whom it is given is liable to a penalty, and the local authority may, if they think fit, execute the works and recover from the owner the expense of so doing. The drain there dealt with was one, in the old sense of the term, which dealt with the drainage of one building. In the first of these cases the facts are that there was, to use a neutral term, a pipe wholly situated on private land, which received the drainage of several houses belonging to different owners and discharged into a public sewer. The case is indistinguishable from several reported cases, and notably from *Bradford* v. *Eastbourne Corporation*. (1) In that case, as in several other cases, the meaning of s. 19 of the Act of 1890, and in particular the meaning of the words "single private drain," has been the subject of discussion. In my opinion, on consideration of the cases, the balance of authority is in favour of upholding the appeals so far as the main point common to both is concerned.

It is not necessary to go through all the cases that have been cited, for I should find it difficult to improve upon the judgments of Lord Russell of Killowen C.J. and Wills J. in *Bradford* v. *Eastbourne Corporation* (1), a decision that has been followed in more than one subsequent case, and a decision which seems to me to give the most reasonable and intelligible interpretation of the section. A case previously decided by Wills J. and

(1) [1896] 2 Q. B. 205.

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Wright J. was *Self* v. *Hove Commissioners* (1), and the interpretation of the section at which the Court arrived in that case was that which was adopted in *Bradford* v. *Eastbourne Corporation* (2), and gave a wide construction to the words of the section. In *Self* v. *Hove Commissioners* (1) the drainage of two houses belonging to different owners was connected with a public sewer by a single private drain, and it was held that the drain was one contemplated by s. 19 of the Act of 1890, and s. 41 of the Act of 1875 being incorporated let in the right of the authority to require that the owner should do the necessary work to abate a nuisance. In a second case in the same year, *Hill* v. *Hair* (3), Cave J. and Lawrance J. took a contrary view. Then came the case of *Bradford* v. *Eastbourne Corporation* (2), in which the Lord Chief Justice and Wills J. in considered judgments adopted the view taken in *Self* v. *Hove Commissioners* (1), and held that a pipe, such as that with which we are dealing in the present case, is a "single private drain" such as is contemplated in s. 19 of the Act of 1890, with the result, by the combined effect of that section and of s. 41 of the Act of 1875, of letting in the liability of the owner, at the instance of the local authority, to repair the pipe so as to do away with the nuisance arising from it. The same question arose in the case of *Seal* v. *Merthyr Tydfil Urban Council* (4), before Cave J. and Ridley J., in which the Divisional Court followed *Bradford* v. *Eastbourne Corporation* (2), the first-named learned judge having reconsidered the view previously taken by him in *Hill* v. *Hair* (3), and adopted that taken by the Lord Chief Justice and Wills J.

That was the state of things when the first case that is before us on appeal came before a Divisional Court. The case of *Bradford* v. *Eastbourne Corporation* (2) was cited during the argument, but we have the authority of Channell J., as appears from the judgment in the second case before us, that the full bearing of the decision was not brought home to his mind.

Under these circumstances the balance of authority is in

(1) [1895] 1 Q. B. 685.
(2) [1896] 2 Q. B. 205.
(3) [1895] 1 Q. B. 906.
(4) [1897] 2 Q. B. 543.

favour of the view taken by the Court in *Bradford* v. *Eastbourne Corporation* (1) as to the combined effect of s. 19 of the Act of 1890 and s. 41 of the Act of 1875. As we have had a full opportunity of considering the arguments and the reasons given for the decision of that case, it would be a waste of time to go through them, or to do more than state that I agree with and adopt them as decisive of this case. It follows that in my opinion the first of the appeals before us must be allowed.

With regard to the second appeal, the position with regard to the drain in that case cannot be distinguished from that which existed in the first appeal. There was, however, a second point which might have been, but was not, taken in the first case. In both the authority sought to compel the owner to do the work necessary to abate a nuisance arising on his land; but in the second case matters had proceeded a step further. A notice to abate the nuisance had been given, and the owner, under protest that she was not liable, had done the work, and brought the action to recover from the local authority the expense to which she had been put. The argument was that she had been compelled to do work which the defendants were legally liable to execute, as the work was done upon a sewer the repair of which fell upon them. The answer of the defendants was that, though the pipe was a sewer before the Act of 1890 and may still be a sewer for some purposes, it was now by the joint operation of s. 19 of that Act and s. 41 of the Act of 1875 a single private drain repairable by the plaintiff, and on this main point the case is on all-fours with the first case on appeal.

The further point raised for the plaintiff was that, on the hypothesis that the pipe was a single private drain, the local authority had not taken the proper steps to make her liable. The position taken was that the authority could not localize the cause of complaint as against the plaintiff, and could not say that she alone was liable to make good the defect, and that as they had not apportioned the expense among all the owners

(1) [1896] 2 Q. B. 205.

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they could not impose on her the burden of the repairs. It was argued that whatever rights the local authority might have had if the proper course had been taken, as that had not been done the expense to which the plaintiff had been put could be recovered as money paid in relief of the authority. Broadly speaking, the Legislature has thrown back upon the private owner an obligation which had previously been upon the local authority, namely, the liability to make good a defective single private drain connecting two or more houses with a public sewer, as described in s. 19, in cases in which the drain is found to have caused a nuisance. That being so, the obligation to repair lay upon the plaintiff, and she was debarred from saying that any work done by her under the exigency of a demand of the local authority was done for them and not on her own account. The point is, not how the local authority had placed the burden on her, but that they had the right to place it on her. A somewhat broader argument was that the provisions of s. 19 with regard to something to be done on the premises of a private owner cannot be applied to the case of a nuisance which arises generally in a drain on the premises of several owners. It was said that the nuisance must be taken as arising out of all the premises. The facts in this case are that the nuisance was asserted by the local authority to exist on the premises of the plaintiff, and it has been proved that it was abated without travelling beyond her premises. Under these circumstances, it is not open to the plaintiff to contend that the nuisance was not upon her property. The nuisance was one that could be and was reached by the procedure which the authority is directed to take. The question of apportionment of expenses did not arise, for it could not do so until the question of liability was determined, and when that was determined it appeared that the whole liability was on the plaintiff.

The result is that this appeal must also be allowed.

STIRLING L.J. The main point in these appeals arising under s. 19 of the Public Health Act, 1890, was dealt with by

Lord Russell of Killowen L.C.J. and Wills J. in the case of *Bradford* v. *Eastbourne Corporation* (1) in careful and well-considered judgments. That decision was in the year 1896, and effect has been given to it from that time till the first of the cases on appeal came before a Divisional Court. The question raised is a difficult one, and reasons of great weight have been brought forward, in both the cases on appeal in the Courts below and before us, to shew that we ought not to follow the decision in *Bradford* v. *Eastbourne Corporation.* (1) I think it is sufficient to say that, though the point is open to serious argument, the reasons to which I have referred are not in my opinion of such weight that we ought to depart from the judgment of the Lord Chief Justice and Wills J.

With regard to the second appeal, another point arises upon s. 19 of the Act of 1890. Sub-sect. 1 of that section enacts that, "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor, or (in case of dispute) by a Court of summary jurisdiction." The section does not say how the application is to be dealt with, and it is suggested that the meaning is that on such an application the local authority may execute the works and recover the expenses in such proportion as shall be settled in the manner indicated. I think that the true meaning of the section is that on such an application the procedure provided by s. 41 of the Act of 1875 is to be followed, and over and above the powers conferred by it there is an additional authority given to recover the expenses in apportioned parts. Speaking generally, the procedure under s. 41 is that after written notice, or in cases of emergency without notice, the local authority may

(1) [1896] 2 Q. B. 205.

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empower their surveyor to enter upon the premises on which the nuisance is supposed to exist, and open the ground and examine the structure. If it is found to be in good order, the ground is to be closed and the damage made good. If a bad condition of things is found, notice is to be given to the owner or occupier to do the necessary works, and, if that is not complied with, penalties are imposed, and the local authority may themselves do the work and recover the expenses incurred by them. As it stands, that section applies to a drain on the ground of a single owner, but s. 19 of the Act of 1890 has extended those provisions to the case of a drain which is in the grounds of several different owners. When an application is made by any person to the local authority pointing to a deficient state of any drain, it is the duty of the authority to go to the place where the nuisance is said to exist, and to begin the examination there. It may possibly be traced to other portions of the drain, and in that case examination must be made there also, and there may be more than one owner who could be called on to execute works necessary to abate the nuisance. On the other hand, there may be but one place at which there is a defect, and it may turn out that by works at that one place the nuisance may be remedied. I cannot see that in the latter case s. 19 imposes upon the local authority the duty of serving notices upon all the owners of the various portions of the drain. It seems to me that it is sufficient to serve notice upon the one owner upon whose land the nuisance exists, and that to such a case the procedure to be adopted in other and different cases is inapplicable. It is to my mind equally clear that in such a case, under the provisions of s. 41 of the Act of 1875, the whole expense incurred may be recovered from the one person to whom notice is given, and that it is not necessary to invoke the superadded authority given to apportion expenses in cases in which it is requisite to do so. I cannot agree, therefore, with the view taken by the learned judge upon this point, and the result is that the defence of the local authority was a good one, and that the appeal should be allowed.

MATHEW L.J. I am of the same opinion. On the main point I think that the decision in *Bradford* v. *Eastbourne Corporation* (1) was right, and that it ought to have been followed.

Under the Public Health Act, 1875, a local authority could insist that each owner of a building should have a separate drain connecting with the public sewer. This was very inconvenient for building owners in many cases, and the local authorities were no doubt approached by various building owners with a view to some arrangement to avoid this inconvenience, and permit the owner of several houses to construct a common drain to carry off their sewage. It would not be right that by allowing this to be done any additional expense should fall on the ratepayers, and the matter would be made the subject of agreement between the building owner and the authority, under which the liability to repair was undertaken by the former. Such an arrangement was provided for in various local Acts. When the different houses were sold a difficulty arose, for the local authority were without the protection which they had when all the houses were in the possession of the original owner. It appears to me that s. 19 of the Act of 1890 was framed to meet this difficulty, and to compel an owner of land on which a nuisance arose in a drain common to his land and that of others to do the necessary works to abate the nuisance. From this point of view the section is intelligible and void of perplexity, for its effect as to each separate owner is to treat a drain common to the land of several owners as if it were a series of drains, each of which was in the land of a single owner.

In the second appeal a matter arises for consideration under s. 19 of the Act of 1890. It is said that a single private drain referred to in that section connecting with a public sewer two or more houses belonging to different owners is one structure, and that all who use it are responsible and must have notice if an obstruction occurs at any point. I think it is clear that view is not consistent with the provisions of s. 41 of the Act of 1875, which is incorporated with s. 19 of the Act of 1890, because s. 41 points to the giving of notice to the person on

(1) [1896] 2 Q. B. 205.

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whose premises the nuisance is ascertained to have arisen, and the apportionment of expenses is only applicable when more than one owner is affected with notice.

Appeals allowed.

Solicitors for Thompson: *Adam Burn & Son, for E. Lorimer Wilson, Manchester.*

Solicitors for Eccles Corporation: *Sharpe, Parker & Co., for W. H. Hickson, Eccles.*

Solicitors for Haedicke: *Edmonds & Simmonds.*

Solicitors for Urban Council: *R. Miller, Wiggins & Naylor.*

A. M.

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Nov. 18.

[CROWN CASE RESERVED.]

THE KING *v.* ELLEN HALE.

Criminal Law—Prevention of Cruelty to Children—Necessity for Attendance of Child at Trial—Prevention of Cruelty to Children Act, 1894 (57 & 58 *Vict. c.* 41), *s.* 16—*Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 16.

Sect. 16 of the Prevention of Cruelty to Children Act, 1894 (which is repealed and partially re-enacted by s. 16 of the Prevention of Cruelty to Children Act, 1904), does not make the presence of the child in Court, except in the cases therein excepted, an essential condition to the hearing of any proceedings with relation to an offence of cruelty within the meaning of the Act.

CASE stated by Kennedy J. at the summer assizes for the county of Glamorgan.

"At the above-mentioned assizes Ellen Hale was tried before me on an indictment which in the first eight counts charged her with offences under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1, in regard to four children of the ages respectively of twelve, seven, five, and three years. The indictment comprised in these counts charges against the prisoner, in regard to each child, of wilfully neglecting the child in a manner likely to cause such child unnecessary suffering and injury to its health.

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"In regard to the second count, which was the count charging the prisoner with wilfully neglecting the eldest child in a manner likely to cause injury to his health, I held there was no evidence which could justify a conviction, and a ninth count against the prisoner under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), and the 57 & 58 Vict. c. 41, s. 11, was not proceeded with.

"The jury found the prisoner guilty in respect of all the four children of the offences charged against her in the first, third, fourth, fifth, sixth, and seventh counts.

"None of the children were produced as witnesses for the prosecution, and none of them were present in Court, and in the course of the trial I drew the attention of Mr. Arthur Lewis, the counsel for the prosecution, to the provisions of s. 16 of the Prevention of Cruelty to Children Act, 1894, and there was some discussion as to whether the effect of the said section is or is not by necessary implication, that a case under the 1st section of the said Act cannot be 'proceeded with and determined' in the absence of the child in respect of whom the offence is alleged to have been committed, except under two conditions specified in the s. 16, viz., (1.) that the Court is satisfied by the evidence of a registered medical practitioner that the attendance of the child before the Court would involve serious danger to its life or health, and (2.) the Court is further satisfied that the evidence of the child is not essential to the just hearing of the case.

"There was in the present case no such evidence of a registered medical practitioner as is mentioned in this section. This 16th section has never received judicial interpretation, and the meaning and application appeared to me to be so far open to argument that I have thought it right, according to the request of the counsel on behalf of the prisoner, to state a case for the opinion of the Court of Crown Cases Reserved upon the question, and I postponed judgment and released the prisoner on bail pending the decision of the Court.

"The question for the consideration of the Court is whether or not, under the said s. 16, at the trial of an indictment under 57 & 58 Vict. c. 41, s. 1, the attendance at the Court of the

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child, in respect of whom the offence is alleged to have been committed, is, except under the circumstances of exception therein specified, requisite and necessary in order that the case may be proceeded with and determined.

"If in the opinion of this Court the case was one in which I ought to have held that, in the absence of the children and of any evidence of a registered medical practitioner to justify their absence, no case had been presented by the prosecution upon which the accused could properly be convicted, the conviction is to be quashed; otherwise the conviction is to stand.

"W. R. Kennedy.

"10th August, 1904." (1)

Clarke Hall, for the prosecution. The section must be interpreted reasonably, and it cannot be contended that in every case the attendance of the child before the Court is a necessary condition to the conviction, unless the Court is satisfied that its attendance would involve serious danger to its life and health and that its evidence is not essential to the just hearing of the case. To hold this would be to introduce into prosecutions under the Act a condition which does not exist in any other class of case. "Attendance" must be read as equivalent to "attendance to give evidence." It is no

(1) By the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 16, "Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the schedule to this Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, and is further satisfied that the evidence of the child is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child."

By the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), which came into operation on October 1, 1904, the Prevention of Cruelty to Children Act, 1894, is repealed; and by s. 16, "Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the first schedule to this Act, the court is satisfied that the attendance before the court of any child in respect of whom the offence is alleged to have been committed is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child."

doubt desirable in most of these cases that the child should be present, especially where the defence is that the actual condition of the child shews that it has not been the subject of any cruelty, but it cannot have been intended to make the presence of the child a condition precedent to every conviction. In no case except that of common assault is the presence of the prosecutor an essential factor. [He referred to *Reg.* v. *Cox*. (1)]

No counsel appeared for the prisoner.

LORD ALVERSTONE C.J. I can well understand the motives that have induced my brother Kennedy to state this case in order that there may be an exposition by this Court of the meaning of this section. Speaking for myself, I have no doubt at all upon the point. It cannot, as it seems to me, be suggested that the section means that in every case the child in respect of whom the charge is alleged should be present in Court. That would be an entirely new and extraordinary enactment, and would have the effect of creating in respect of this class of offence a condition that does not exist in regard to any other criminal case. There is some difficulty in seeing why such a section was enacted at all, but in my opinion the difficulty is removed if we read the expression "attendance" in s. 16 as being equivalent to "attendance for the purpose of giving evidence." Any one who is acquainted with the theory and practice of criminal law knows that the power and authority of a judge when trying such a case to require that a person should or should not be called is a quite sufficient power and exists quite apart from the legislative enactments of this Act. But it is not infrequent that the framers of such Acts as this, not remembering, and perhaps not even being acquainted with, all the rules of criminal jurisdiction, have inadvertently inserted clauses which are not strictly necessary. That may be the explanation of the insertion of this section, which provides that where in any proceedings the Court is satisfied that the attendance of the child would involve danger to its life or health, and, further, that the child's evidence is not essential to the just

(1) [1898] 1 Q. B. 179.

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hearing of the charge, it need not be called. No doubt the Court has always possessed this power. The section, however, may have been enacted in the interests of the prisoner to point out that when the child's evidence was really essential to the just hearing of the case the Court should not dispense with its presence. Probably the provision as to the evidence of a registered medical practitioner is also unnecessary, but the framers of the Act may have thought that at any rate in the preliminary examination before the magistrates this condition should also be fulfilled in order that the evidence of the child should not be dispensed with too easily. That is, as it seems to me, the true explanation of the section, and certainly to hold otherwise would be to read into the section "and in every other case the child must be present," which can never have been the intention of the Legislature, and would carry the section much further than the words will warrant, and would, as I have said, create in respect of this class of offence a condition which is not to be found in any other.

I come, therefore, to the conclusion that the proceedings were in order and that the conviction must stand.

LAWRANCE J. I agree.

KENNEDY J. I agree, and I will only add that I think it is a very good thing that there should be this judicial exposition of the section, since standing by itself and without any explanation it certainly gives rise to considerable difficulty.

RIDLEY and CHANNELL JJ. agreed.

Conviction affirmed.

Solicitors for prosecution : *Moreton Phillips & Son.*

A. P. P. K.

[CROWN CASE RESERVED.]

1904
Nov. 18.

THE KING *v.* JOHN BRIDGWATER.

Criminal Law—Evidence—Nature or Conduct of Defence—Evidence of Person charged—Cross-examination as to previous Conviction—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *sub-s.* (*f*), (*ii.*)

A prisoner who was arrested in possession of stolen property said in answer to the charge that he was acting under instructions from a detective, and at the trial at quarter sessions the detective was cross-examined as to whether he had not employed the prisoner as an informer:—

Held, that the nature or conduct of the defence was not such as to involve imputations on the character of the witnesses for the prosecution under s. 1, sub-s. (*f*), (ii.), of the Criminal Evidence Act, 1898, so as to render the prisoner liable when called in his own defence to be cross-examined as to previous convictions.

CASE stated by the Recorder of Birmingham.

At the Birmingham Quarter Sessions on October 31, 1904, John Bridgwater and a man named Woolf, who pleaded guilty, were tried before the recorder on a charge of stealing seventeen yards of copper tape, the property of Statter & Co., on October 11, 1904.

It appeared that Woolf, who was warehouseman to Statter & Co., was seen by a police constable on October 11 to bring something out of their premises and put it into a perambulator under the direction and control of Bridgwater. The perambulator was searched, and the stolen copper was found in it. On being taken to the police station and charged, Bridgwater said, "I am working under instructions from Sergeant Moss." At the trial before the recorder, Detective-sergeant Moss of the Birmingham police force was called, and said in his examination in chief, "I have known John Bridgwater since December, 1903, personally. I have no connection with him in respect of any robbery from Statter's. I had not the faintest idea there had been any such robbery."

Cross-examined by counsel for the prisoner: "My first interview with Bridgwater was in consequence of some one having

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approached Messrs. Hayes asking them what price they would give for silver, with a bill-head of Samuel Ceston, coal merchant, Snow Hill Wharf, Birmingham. I went to see Ceston at Snow Hill Wharf, and from what he said I went to a casting shop in the wharf which is let to John Bridgwater by Ceston. I there saw Bridgwater. From that time I have been on friendly terms with him. I know what a 'tarbat' means. It means an informer—a man who gets information from thieves for the police. He was at times. I gave him instructions that if anybody approached him asking him to buy anything in metal, and he thought it was of doubtful circumstances, not to buy but to let me know, and if possible to get samples from those who came to him. My object was to catch the thieves. He has given me information, but never information which has led to the arrest of any one."

At the conclusion of the case for the prosecution the prisoner went into the box and was sworn. The following was the recorder's note of his evidence as far as material: "I am a brass caster and metal dealer. I carry on business at Snow Hill Wharf. October 10 Woolf came to me. He said he had some copper for sale. Would I buy it—50 to 60 lbs. weight? He told me to come up at 8.30 or 9 P.M. for it. I saw Woolf outside a public-house about 8.30 P.M., and we went in and had a drink. I paid him 12*s.* 6*d.* on account, and told him to call next day for the balance. The price was to be 50*s.* per cwt. . . . . I did not refuse to go to the station . . . . I said nothing about Moss till I got to the station. As soon as I saw what sort of copper it was, I said it was wrong. I had not seen the metal till the police constable pulled it out at the station. I considered I was acting under the instructions of Moss. I was with Moss on the previous Saturday and Monday. I told him I was going to buy some copper. He said, 'All right, let me see it,' and that was this copper. Moss and I had been great friends for eight or nine months. I have been with him three or four times a day. The Crown, Snow Hill, was our meeting ground . . . . I gave him information on several occasions."

In cross-examination Bridgwater was asked by the counsel

for the prosecution, "Have you ever been convicted?" and replied, "Yes, sir, I have."

Counsel was then proceeding to ask what the conviction was for, when counsel for the prisoner objected on the ground that s. 1, sub-s. (*f*), of the Criminal Evidence Act, 1898, was prohibitive, and that, independently of any objection by counsel, no such question could be asked unless there was justification for it as provided by the section.

The recorder said that in his judgment objection ought to have been taken to the question as to previous conviction before the witness had answered it, but that he considered that Bridgwater's statement at the police station in answer to the charge involved imputations on the character of Sergeant Moss, and that the nature and conduct of the defence at the trial before him (the recorder) was such as to involve imputations on Moss. Counsel for the prisoner stated that he had not suggested that Moss had acted dishonestly. The recorder decided that the case must proceed, and the further question as to previous conviction was not pressed.

In summing up the recorder directed the jury that if they thought that the prisoner was in point of fact acting under the directions of Moss, or had reasonable grounds for believing that he was acting under the directions of Moss, they should acquit him, but that if they thought that he was making an independent deal for himself they should find him guilty.

The jury returned a verdict of guilty. Sentence was postponed, and the prisoner was remanded to prison.

The attention of the recorder was directed to the following cases, *Charnock* v. *Merchant* (1), *Rex* v. *Rouse* (2), by the counsel for the prisoner.

The question for the opinion of the Court was whether, under the circumstances of the case, counsel for the prosecution was entitled to put to the prisoner John Bridgwater the questions relating to his previous conviction. (3)

(1) [1900] 1 Q. B. 474.

(2) [1904] 1 K. B. 184.

(3) By the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (*f*), "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been

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No counsel appeared either for the prosecution or for the defence.

LORD ALVERSTONE C.J. We think that the objection taken in this case must be held to be valid, and that the conviction is therefore bad. We have to consider whether the circumstances of the case were such as to justify the counsel for the prosecution questioning the prisoner as to previous convictions. The section provides that when a person charged is called as a witness in pursuance of the Act he shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has been convicted of any other offence unless (inter alia) the nature or conduct of the defence has been such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

I must repeat what I have said before, namely, that raising a defence, even in forcible language, is not of necessity casting imputations on the character of the prosecutor or his witnesses. No doubt imputations may be cast on their character quite independently of the defence raised, either by direct evidence or by questions put to them in cross-examination.

In this case it cannot be said that the recorder regarded what happened in the course of the case as other than raising the defence. His direction to the jury shews that he dealt with the case on that view. He said: "I directed the jury that if they thought the prisoner was in point of fact acting under the directions of Moss, or had reasonable grounds for believing he was acting under the directions of Moss, they should acquit him." He therefore acted on the view that the defence raised was not such as to cast any imputation on Moss. It seems to me on the whole statement the prisoner's counsel by his questions to Moss was not doing more than

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charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . .

"(ii.) He has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

developing his defence that the prisoner believed that he was acting under Moss's directions, and seeking to substantiate that defence by means of admissions from Moss. If the questions put to Moss had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the prosecutor's general character.

The question as to whether the prisoner had been convicted was answered without any objection from the prisoner's counsel, and he only objected to the further question as to the nature of the offence for which he had been convicted. It must not be thought that because counsel for a prisoner allows a question as to previous conviction to be put without objection he can afterwards set aside the conviction on the ground of the inadmissibility of such a question. He cannot stand aside and allow an improper question to be put and afterwards rely upon that question as a ground for quashing the conviction. In this case, and under the circumstances, if the learned recorder had told the jury that they were to disregard the prisoner's answer as to his having been previously convicted, this Court would not, I think, have been inclined to interfere. But, as far as we can gather from the statement of the case, the recorder did not do anything of the kind, and therefore it was made to appear to the jury that the question was justified under the Act because, in the words of the section, the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. We can see no ground for any such suggestion, and therefore the question ought not to have been put; and as it was put, and the jury were not cautioned to disregard the answer, the conviction cannot stand and must be quashed.

LAWRANCE, KENNEDY, RIDLEY, and CHANNELL JJ. concurred.

Conviction quashed.

A. P. P. K.

1904
Oct. 25.

KEENE *v.* THOMAS.

Lien—Hire-purchase Agreement—Liability to repair Hired Chattel—Lien as against Owner.

By a hire-purchase agreement the plaintiff let a dogcart to a person who in the course of time sent the cart to be repaired to the defendant, who was a coach-builder. The hire-purchase agreement contained a clause by which the hirer undertook "to keep and preserve the dogcart from injury." Some instalments under the agreement being unpaid the plaintiff sought to recover the cart, but the defendant claimed a lien upon it for the cost of the repairs:—

Held, that under the circumstances the hirer had authority to send the cart to be repaired, and therefore that the defendant's lien was good, not only against the hirer, but also against the plaintiff.

APPEAL from the Hampshire County Court.

On June 20, 1903, the plaintiff by a hire-purchase agreement let one Robertson a dogcart, to be paid for by monthly instalments. By the agreement Robertson agreed (inter alia) "to keep and preserve the said dogcart from injury (damage by fire included)." Default having been made in the payment of the instalments, the plaintiff on seeking to retake possession of the dogcart found that it was in the possession of the defendant, who was a coach-builder, and with whom the cart had been left by Robertson to be repaired. The defendant claimed a lien on the cart for the cost of the repairs, and declined to give it up to the plaintiff till those costs had been paid.

This action was then brought in the county court claiming the return of the cart or its value, and damages for its detention.

The county court judge held that the agreement between the plaintiff and Robertson contemplated repairs being done, and that there must be taken to be an implied agreement between Robertson and the plaintiff that Robertson should have reasonable repairs to the cart done by a coach-builder if necessary, and that under the circumstances the defendant had a lien for his charges against the plaintiff; and he gave judgment for the defendant accordingly.

The plaintiff appealed.

S. H. Emanuel, for the appellant. The county court judge was wrong. There must be an express authority to create a lien: *Buxton* v. *Baughan*. (1) No such authority can be implied from the hire-purchase agreement. The lien was only good as against Robertson, and had no validity as against the plaintiff.

E. Grimwood Mears, for the respondent. The county court judge was right. Robertson was lawfully in possession of the dogcart when he sent it to the defendant to be repaired. By the terms of the hire-purchase agreement he was bound to preserve it from injury, and he therefore had authority from the plaintiff to get it repaired when repairs were necessary. It is part of the reasonable user of the hired chattel: *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (2) He created a lien, not only as against himself, but as against the plaintiff. A lien may be created without any express words: *Weldon* v. *Gould*. (3)

Emanuel replied.

LORD ALVERSTONE C.J. This case raises an important point, and one on which there is not much direct authority. I am rather surprised indeed that there is not more, but probably hire-purchase agreements were not so common formerly as they are now. I think that the county court judge has come to a right conclusion. The real question that we have to decide is that stated by Alderson B. in *Buxton* v. *Baughan* (1), namely, whether the man who made the bargain with the repairer had authority from the plaintiff to make such a bargain. There is no doubt that Robertson made the bargain that the trap should be repaired by the defendant. The hire-purchase agreement expressly says that Robertson is "to keep and preserve the said dogcart from injury (damage by fire included)." No doubt there might be some circumstances in which Robertson would not be responsible to the plaintiff under this clause, but it is not necessary for us now to consider the exact extent of Robertson's responsibility thereunder. The clause does give Robertson

(1) (1834) 6 C. & P. 674; 40 R. R. 842. (2) [1894] 1 Q. B. 833.
(3) (1801) 3 Esp. 268; 6 R. R. 832.

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Lord Alverstone C.J.

authority to take care of the cart and to keep it in proper order, and that in my opinion implies an authority on the plaintiff's behalf to get the trap repaired if it needed repair, as it cannot be contended that Robertson was bound to do the repairs with his own hands.

The case of *Buxton* v. *Baughan* (1) is not an authority in favour of the plaintiff. The facts there were not the same. In that case Alderson B. said: "If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain, and may reclaim the goods. . . . . A man has no right to keep my property, and charge for the standing of it, unless there was a previous bargain between him and me, or between him and some agent authorized by me"; and he held there on the facts in that case that there was no such authority.

The principle laid down by Collins J. in the case of *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (2) goes a long way to support the proposition that the hirer is entitled to use the hired chattel for all reasonable purposes, and in my opinion in this case the hirer of the chattel having undertaken to keep it in repair, and having at any rate a duty to take care of it, and having employed the defendant to repair it, has created a lien in respect of the proper cost of the repairs, not only against himself, but also against the plaintiff, the owner of the trap. The appeal must, therefore, be dismissed.

KENNEDY and RIDLEY JJ. concurred.

Appeal dismissed.

Solicitor for appellant: *P. J. Nicholls, for Hallett & Martin, Southampton.*

Solicitors for respondent: *Speechly, Mumford, Rodgers & Craig, for Lamport, Bassitt & Hiscock, Newport, Isle of Wight.*

(1) 6 C. & P. 674; 40 R. R. 842. (2) [1894] 1 Q. B. 833.

A. P. P. K.

ASH, APPELLANT *v.* NICHOLL, RESPONDENT.
COX, APPELLANT *v.* MERRIMAN, RESPONDENT.

1904
Nov. 18.

Parliament — Franchise — Qualification — Non-payment of Rate— Passive Resister—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-ss.* 3, 4—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9, *sub-s.* 2 (*d*), (*e*).

A person who on or before July 20 in any year has not paid the whole of the rates assessed upon him as poor-rate in respect of the qualifying property up to the preceding January 5 is not entitled to be on the parliamentary or burgess list of voters.

ASH *v.* NICHOLL.

CASE stated by the revising barrister for the borough of Scarborough.

The facts of the case were as follows:—

"The borough of Scarborough is a parliamentary and a municipal borough, and has a borough fund for which a borough rate is levied.

"A poor-rate for the said borough for the year 1903–4 had been duly made and signed by the overseers, and had been duly signed by the justices on April 24, 1903. A demand note for payment of the said poor-rate had been duly made upon the appellant.

"The said poor-rate included among other charges an education rate of 1*d.* in the pound and a burial rate of 1½*d.* in the pound.

"No separate rate had been levied for the education rate under s. 18 of the Education Act, 1902 (2 Edw. 7, c. 42), and no separate rate had been levied for the burial rate under s. 1 of the Burial Act, 1860 (23 & 24 Vict. c. 64).

"The said education rate and the said burial rate were not collected with the poor-rate for the sake of convenience.

"The name of the appellant had been omitted by the overseers from the list of inhabitant householders on the ground that the poor-rate on the qualifying property, due on January 5, 1904, had not been fully paid on or before July 20, 1904.

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"On or before July 20, 1904, the other ordinary occupiers, with the exception of the appellant and thirty-nine other persons, all of whom were known by the name of 'passive resisters,' had bonâ fide paid all poor-rates that had become payable by them in respect of the premises occupied by them up to the preceding January 5, 1904.

"The inhabitant householders list is made out in three divisions, carrying the following franchises :—

"I. Both Parliamentary and Burgess.

"II. Parliamentary only, and

"III. Burgess only.

"It was admitted that the appellant had refused to pay and had not paid that portion of the poor-rate levied for the purposes of education in the said borough, and that the amount of 1*s.* 6*d.* was due thereon on January 5, 1904, and had not been fully paid on or before July 20, 1904.

"Thirty-nine other persons, whose names and qualifications are set out in a schedule to the case, claimed to be inserted in the said list of inhabitant householders under similar circumstances.

"Three points of law were taken :—

"*A.* That the education rate was not a poor-rate, and that non-payment of poor-rate alone and of no other rates disqualified an inhabitant householder in a parliamentary and municipal borough from being inserted in Division I. of the list of voters.

"*B.* That the education rate was not a borough rate for the purposes of the Registration Acts.

"*C.* That non-payment of the burial rate did not disqualify an inhabitant householder in a parliamentary and municipal borough from being inserted in Division I. of the list of voters.

"*A.* On the first point I decided that the education rate was chargeable upon the poor-rate according to law, that it formed part of the poor-rate, and that the said poor-rate as made and demanded was one rate and indivisible. 'Poor-rate' is defined in s. 20 of the Poor Rate Assessment Act, 1869 (32 & 33 Vict. c. 41) in these words : 'Poor-rate shall mean the assessment for the relief of the poor and for the other purposes chargeable

thereon according to law'—clearly indicating that there may be poor-rates other than those to be expended simply for the relief of the poor.

"Statutes dealing with education point to the conclusion that the education rate is part of the poor-rate.

"By s. 18 of the Education Act, 1902, the expenses of the council of an urban district other than a borough are to be raised in the manner provided by s. 33 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79)—that is, they are to be paid out of a fund to be raised out of the poor-rates for the parish or parishes for which the committee of management act; and as to a borough, by the same section (18) of the Education Act, 1902, the expenses are to be paid out of the borough fund or rate, and by s. 145 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50) the council of a borough has power to order a parish within the borough to pay its contribution to the borough rate out of the poor-rate.

"I further decided that in a parliamentary and municipal borough an unpaid poor-rate was not the only disqualifying rate; that payment on or before July 20, 1904, of all borough rates as well as poor-rates due on on January 5, 1904, was essential to registration in Division I. of the said list of inhabitant householders as to the parliamentary franchise by s. 3, sub-ss. 3, 4, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and as to the burgess franchise by s. 9, sub-s. 2, (*d*), (*e*), of the Municipal Corporations Act, 1882; and I also decided that these disqualifications operated respectively in regard to the insertion of the name of the appellant either in Division II. or in Division III.

"B. On the second point I decided that the education rate was a borough rate payable out of the borough fund for the purposes of the Registration Acts.

"The point seemed to me unarguable; having regard to s. 18 of the Education Act, 1902, the words 'the expenses under the Act shall be paid out of the borough fund or rate' seem to me to admit of no other construction.

"C. On the third point it was contended that by s. 1 of the Burial Act, 1860, the burial rate was levied as a separate rate,

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and therefore non-payment of it did not disqualify the appellant from being inserted in the said list, and that as the amount due on the burial rate (1½*d.* in the pound) exceeded by one half-penny in the pound the amount due on the education rate (1*d.* in the pound), it followed that the education rate had been fully paid, and that no part of the poor-rate remained unsatisfied.

"I decided that the true construction of s. 1 was that for the purposes of the Burial Acts the authority had an option to levy either a general or a separate rate, and that in the present case the said authority had levied a general and not a separate rate, and that the said burial rate was a borough rate the non-payment of which disqualified the appellant from being inserted in the said list of inhabitant householders by virtue of s. 3, sub-ss. 3, 4, of the Representation of the People Act, 1867 (Parliamentary), and of s. 9, sub-s. 3, (*d*), (*e*), of the Municipal Corporations Act, 1882 (Burgess).

"D. I also decided that the appellant had not on or before July 20, 1904, bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that had become payable by him in respect of his said premises up to the preceding 5th January, 1904, and that he was disqualified thereby from being inserted in the said list by s. 3, sub-s. 4, of the Representation of the People Act, 1867.

"I disallowed the claims of the appellant and the said thirty-nine other persons to be inserted in the said list of inhabitant householders.

"Due notice of appeal from my decision was given, and I ordered the appeals in all the before-mentioned cases to be consolidated.

"If the Court should be of opinion that all my decisions were wrong, the register is to be amended by inserting the names of the appellant and the said thirty-nine other persons on the said list of inhabitant householders; but if the Court should be of opinion that any one of my decisions in A, B, C, or D were right, the said list shall stand without amendment."

Cyril Dodd, K.C., for the appellant Ash. The revising barrister was wrong in refusing to insert the appellant's name.

The education rate is not such a part of the poor-rate that an omission to pay it is a disqualification for the franchise.

The education rate is provided for by s. 18 of the Education Act, 1902, which provides that the expenses of the council of a borough shall be paid out of the borough fund or rate or, if no borough rate is levied, out of a separate rate to be made, assessed, and levied in like manner as the borough rate. The making, assessing, and levying of a borough rate is provided for by s. 144 of the Municipal Corporations Act, 1882. The borough rate, although assessed as if it were a poor-rate, is not a poor-rate, and by s. 250, sub-s. 3, the borough council may, if they think fit, collect it by their own officers instead of directing the overseers of a parish to pay the contribution of the parish to the borough rate out of the poor-rate, as they are empowered to do by s. 145.

The right to the franchise depends on the Representation of the People Act, 1884 (48 & 49 Vict. c. 3), which by s. 2 established a uniform household franchise, and by s. 7, sub-s. 1, defined the household qualification as that enacted by s. 3 of the Representation of the People Act, 1867. That section provides that every man shall be entitled to be registered as a voter who is qualified as follows—that is to say (inter alia), sub-s. 3: "Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises, and (4.) has on or before the 20th day of July in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of January."

It is plain that the section means that in order to be qualified the applicant must have paid, on or before July 20, all poor-rates that have become payable by him in respect of the qualifying premises up to the preceding January 5. But when the Act of 1867 was passed, poor-rates were rates collected for the relief of the poor, and it was never intended that other rates, such as the burial rate or the education rate,

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which, for the sake of convenience, are collected with and as if they were poor-rates, should be treated for all purposes as poor-rates, and if they are unpaid should exclude a person, from whom they were demanded, from the franchise. Poor-rate, as mentioned in the section, meant poor-rate properly so called; and so long as that is duly paid, the omission to pay other rates which are collected as if they were poor-rate does not disqualify.

The object of the section was not to enforce the rates, but to secure evidence of occupation, which was best given by shewing that the poor-rate had been paid by the person claiming the franchise during the qualifying period. The only authorities bearing on the question are *Earl of Cork* v. *Cork County Council* (1); *M'Daid* v. *Galbraith*. (2) The latter case is against the contention of the appellant, but is not an authority, as the Irish Rating Acts are expressed in different terms.

Sect. 20 of the Poor Rate Assessment Act, 1869, only defines "poor-rate" for the purposes of that Act, and cannot have any application to the preceding Act of 1867. It could never have been intended that every new charge which was put upon the poor-rate should be an additional disqualification to voters.

Jeeves, for the respondent, the town clerk of Scarborough, stated that he was not instructed to take any part in the argument.

COX *v.* MERRIMAN.

Case stated by the revising barrister for the Eastern Division of the county of Wilts.

"At a Court holden at Marlborough, in the county of Wilts, on September 26, 1904, Edward Cox duly claimed to have his name inserted in the list of the inhabitant householders in Division I. as a parliamentary elector for the said Eastern Division of the said county, and as a county and parochial elector for the administrative county of Wiltshire.

"The facts of the case were as follows:—

"Edward Cox, of 24, Herd Street, Marlborough, duly made a

(1) [1903] 2 I. R. 490. (2) [1901] 2 I. R. 490.

claim, dated August 17, 1904, to have his name inserted in the occupiers list (Division I.) as a duly qualified voter for the parish of St. Mary, Marlborough, entitling him to vote at a parliamentary election, and also at any county council or parochial election held in and for the said Eastern Division of Wiltshire, in respect of a certain dwelling-house situate at 24, Herd Street, Marlborough, aforesaid, of which the said Edward Cox was the occupier.

"It was proved by the assistant overseer of the said parish upon oath that the whole of the poor-rate due on January 5, 1904, in respect of the said dwelling-house had not been paid either on or before July 20, 1904, as required or at all.

"The trustees of the Primitive Methodist Chapel in the said parish were rated as owners of the said premises, and the overseers of the poor of the said parish demanded from them payment of the poor-rate made October 20, 1903, to meet expenses which would be incurred before March 25, 1904, and of the arrears of former rates.

"The rates as demanded amounted on January 5, 1904, to 6*s.* 0½*d.*, made up of 4*s.* 6*d.*, being an instalment of the rate made on October 20, 1903, and 1*s.* 6½*d.* arrears of former rates. The said rate, due, however, on January 5, 1904, was reduced to 5*s.* 4½*d.* by reason of the chapel trustees having compromised for the said rates as owners of the premises.

"The said owners paid on account of the said rates 3*s.* 5½*d.* on February 26, 1904, leaving a balance still due of 1*s.* 11*d.*, which was still unpaid on July 20, 1904.

"The demand note shews on the back of it how the rate of 1*s.* 6*d.* in the pound is made up, and is as follows:—

	s.	*d.*
'Relief of the poor and other expenses of the guardians	0	6½
County contributions	0	10½
Expenses of the overseers	0	1
Total	1	6

"With the exception of the said demand note, no evidence

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whatever was given or tendered to me as to what part of the said rate was unpaid; but it was contended by the party agent that the amount so left unpaid was in respect of the rate for education, and that that part was included in the $10\frac{1}{2}d.$ for county contributions.

"I invited evidence of these contentions, but none was forthcoming.

"Eight other persons, whose names are set out in the schedule to this case, claimed to be inserted in the said list under similar circumstances.

"I decided as a fact that the whole of the poor-rate due on January 5, 1904, and duly demanded by the said overseers in respect of the said premises, had not been paid on or before July 20, 1904; and I therefore disallowed the claim of the said Edward Cox and of the said eight other persons to be put upon the said list.

"Due notice of appeal from my decision was given; and I ordered the appeals in all the before-mentioned cases to be consolidated.

"If the Court be of opinion that my decision was wrong, the register is to be amended by inserting the name of the said Edward Cox and of the said eight other persons in the said list."

R. M. Montgomery, for the appellant Cox. The real question is whether the rate levied for county contributions is poor-rate within the meaning of s. 3 of the Representation of the People Act, 1867. There is a distinction between a precept for county contributions and a precept for poor-rate. This is shewn by s. 68, sub-s. 6, of the Local Government Act, 1888 (51 & 52 Vict. c. 41). They are always separated on the demand note, and all that a man is bound to pay in order to be qualified for insertion on the register is the poor-rate properly so called, that is to say, so much of the rate demanded as it appears from the demand note will be allocated to the actual relief of the poor. A man is entitled to allocate the sum he pays to such part of the rate demanded as he pleases. [He referred to *Bell* v. *Galt*. (1)]

(1) (1896) 34 Sc. L. R. 327.

There is a further point in this case, since it was not shewn that the appellant (the occupier) had notice that the owners, who had compounded for rates, had not paid them. Obviously where a tenant may be disqualified, if the owner who has compounded for rates has not paid them, notice to the tenant that the rate has not been paid is an essential element to his disqualification, and there was no evidence here that any such notice had been given to the appellant by the overseers. It is for the person objecting to shew that notice was given, and unless there is evidence of notice the objection cannot stand.

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. On the substantial point argued in these cases we have no doubt whatever. The broad contention is, that although a demand for payment of a poor-rate has been made in proper form upon a person who is liable to pay that rate, yet because that demand includes a statement of the objects for which the rate demanded is required that is sufficient to justify that person in saying that he will only pay so much of the rate as is demanded for the purpose of the relief of the poor, and to permit him to decline to pay the balance of the rate which is not to be used for that purpose, and that by refusing to pay the balance he does not become disqualified from being placed upon the lists of parliamentary, county, and municipal electors. It is contended that by having paid the amount which is claimed for poor-rate purposes properly so called he has paid all that was demanded of him as poor-rate, and so has fulfilled the requirements of the statute. It is not necessary to go through all the Acts of Parliament dealing with the subject. It is only necessary, in my opinion, to refer to s. 3, sub-ss. 3 and 4, of the Representation of the People Act, 1867, and to s. 9, sub-s. 2 (*d*), (*e*), of the Municipal Corporations Act, 1882. Those sections meet the contention in regard to the parliamentary and borough franchise respectively. By s. 3 of the Representation of the People Act, 1867, every man shall be entitled to be registered as a voter who has during the time of his occupation of any dwelling-house within a borough

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been rated as an ordinary occupier in respect of the premises so occupied by him to all rates made for the relief of the poor in respect of such premises, and has before July 20 in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the premises up to the preceding January 5.

By s. 9 of the Municipal Corporations Act, 1882, a person shall not be entitled to be enrolled as a burgess unless he has been rated in respect of the qualifying property to all poor-rates made during the last twelve months for the parish wherein the property is situate, and has on or before July 20 paid all such rates, including borough rates, if any, as have become payable by him in respect of the qualifying property up to the preceding January 5.

The question which arises under those sections irrespective of any subsequent legislation is whether a person who objects to any part of the objects to which the poor-rate when collected will be applied can refuse to pay that part of the rate without becoming disqualified under those sections. It is plain—and I desire to point this out emphatically—that the question does not depend on the particular objections entertained by persons who have been styled "passive resisters"; the question would be the same in regard to any person who objected to pay any part of the rate.

It is quite obvious that since 1867 there are a number of purposes in respect of which poor-rate is levied which are not poor-rate purposes under the old Act. The Municipal Corporations Act, 1882, recognises that fact, because in s. 9 it recognises that there may be a borough rate included in the poor-rate. The fact that the poor-rate includes other purposes than the relief of the poor cannot be contested. It is a state of things which has existed for a very long time. By s. 20 of the Poor Rate Assessment Act, 1869, "poor-rate" is said to mean "the assessment for the relief of the poor and for the other purposes chargeable thereon according to law." As appears from the Act itself, it was dealing with a matter which the framers of the Act knew might affect the franchise of the

ratepayer. Since the Elementary Education Act of 1876 provision has been made for defraying education expenses out of poor-rate, and this point might have been raised at any time after that date, and a person might have declined to pay anything more of the poor-rate than was referable to the objects of that rate as they existed when the Representation of the People Act, 1867, was passed, and have claimed to be nevertheless entitled to the franchise under that Act. I do not think that a person can refuse to pay so much of the poor-rate as he thinks will be devoted to objects other than the relief of the poor and yet retain his qualification for the franchise. With regard to the borough rate, I do not think I need add anything to what the revising barrister has said in his judgment. He decided that the education rate was a borough rate payable out of the borough fund for the purposes of the Registration Acts.

The point raised by the appellants seems to me unarguable, having regard to s. 18 of the Education Act, 1902 (2 Edw. 7, c. 42): "The expenses of a council under this Act shall, so far as not otherwise provided for, be paid, in the case of the council of a county, out of the county fund and, in the case of the council of a borough, out of the borough fund."

There is another incident in the case of *Ash* v. *Nicholl*. Among the other charges included in the poor-rate was a burial rate of 1½*d*. in the pound and an education rate of 1*d*. in the pound, and it was contended that by s. 1 of the Burial Act of 1860 the burial rate was levied as a separate rate, and therefore non-payment of the amount required for burial purposes did not disqualify the appellant from the franchise, and that as the amount due on the burial rate exceeded by one halfpenny the amount due on the education rate, and this part of the rate had been paid, it followed that the education rate had been paid and no part of the poor-rate remained unsatisfied. I think that the revising barrister was right in deciding that the local authority had an option to levy for the purposes of the Burial Acts either a general or a separate rate, and that having levied a general rate the burial rate was a borough rate the non-payment of which excluded the appellant from the franchise. In my opinion, where there is a general rate

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a man cannot decline to pay more than he thinks is due for poor-rate purposes properly so called without losing his right to the franchise.

It seems to me in accordance with common sense that a rate-payer should not be allowed to embarrass the local authority by refusing to pay the whole rate because he objects either to the burial rate or to some other of the purposes included in the general rate. To say that a person who is properly assessed to poor-rate, and who is liable to pay it, need only pay so much of it as he approves is contrary alike to principle and to authority. Can it be that a person may say that he has paid all that can be demanded in respect of poor-rate properly so called and decline to pay any more, and yet be qualified to be put on the lists? I think the revising barristers were quite right in deciding that he cannot.

With regard to the point raised by Mr. Montgomery, I do not think that we ought to assume that no notice was served on the appellant by the overseers to the effect that the landlord had not paid the rate, nor can we assume that that point was taken before the revising barrister. That point is not raised by the case, and by the case we are bound. I do not, therefore, express any opinion on the question as to what the occupier's rights might be if no notice had been given. In my opinion, all that these two cases intended to raise was whether a person can claim to be on the register when he has not paid the whole of the rates properly levied as poor-rates and lawfully demanded of him. On that question I am clearly of opinion that the conclusion of the revising barrister was right, and that these appeals must be dismissed.

KENNEDY J. I am of the same opinion, and I desire to add very little. I think it is impossible to say that a poor-rate which is levied as one rate is not in fact one rate because in the demand certain purposes are specified besides the relief of the poor for which the sum levied is required. The demand is a demand for poor-rate payable in one sum, and I doubt whether the authorities have any power to give a receipt for so much money, part of the rate, as a person, objecting to pay

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the rate in respect of certain other purposes, thinks right to pay in respect of particular claims included in the rate. The ratepayer has no right to allocate a partial payment to any particular purpose, nor, I think, has the collector the right to give a receipt for it.

The Scottish case of *Bell* v. *Galt* (1) which has been referred to really leaves the point undecided, but it says that without appropriation the poor-rate cannot be regarded as paid when only part of it is paid. In my opinion the poor-rate is one indivisible rate, and it is impossible to say that the appellants in the two cases before us had paid the poor-rate when in fact they had only paid part of the amount demanded of them.

RIDLEY J. I agree.

Appeals dismissed.

Solicitors for appellant in *Ash* v. *Nicholl*: *Jaques & Co., for Richardson & Parker, Scarborough.*

Solicitors for respondent: *D. A. Nicholl, Scarborough.*

Solicitors for the appellant in *Cox* v. *Merriman*: *Lloyd-George, Roberts & Co.*

(1) 34 Sc. L. R. 327.

A. P. P.

C. A.
1904
Nov. 29, 30;
Dec. 2.

[IN THE COURT OF APPEAL.]

GEEN *v.* HERRING.

Practice—Costs—Action for Recovery of Land — Landlord and Tenant — Forfeiture for Breach of Covenant — Unnecessary Defendants—Weekly Tenants—Disallowance of Costs as unnecessarily incurred—Order LXV., *r.* 27, *sub-r.* 20.

The owner of the reversions upon four leases, each comprising a number of houses, brought four actions for the recovery of the houses respectively comprised in each lease, on the ground of forfeiture for breach of covenants to repair contained in the leases. He made defendants in the actions a very large number of persons, who respectively occupied the houses as weekly tenants to one H., to whom the leases had been assigned. H. obtained leave to appear and defend the actions; and, subsequently, having put the houses into a state of repair, he made application in each action for relief against the forfeiture. An order for such relief was made by consent in each action on condition of his paying the plaintiff's costs of the action as between solicitor and client. On taxation of the plaintiff's costs, the master allowed in each action (inter alia) items in respect of copies of the writ for service, and service thereof on each of the weekly tenants. On application for a review of taxation, the Court being of opinion that, under the circumstances, the real object of the actions, namely, to compel the execution of the repairs, might have been attained by one action against H. as sole defendant:—

Held, that, the above-mentioned items having been unnecessarily incurred, they must be disallowed under Order LXV., r. 27, sub-r. 20, but that, H. having consented to an order for relief in each action being made on condition of his paying the plaintiff's costs of the action, the Court could not order that the plaintiff should only have the costs of one action.

APPEAL from an order of Bruce J. at chambers refusing to order a review of taxation of the master as after mentioned.

Four actions for the recovery of possession of a large number of houses had been brought under the following circumstances. Four leases for long terms had been granted by the owner of the freehold, each comprising a portion of the before-mentioned houses. The owners of these leases had subsequently granted four sub-leases, respectively comprising the houses comprised in the respective leases, of which sub-leases one Herring had become the assignee. The head leases of the houses had become vested in the plaintiff. Both the head

leases and sub-leases of the houses respectively contained covenants to repair and conditions of re-entry for breach of covenant. Herring had let the various houses comprised in the sub-leases to weekly tenants, who were in occupation thereof. It appeared that the plaintiff had received rents due under the sub-leases from Herring. The houses being out of repair, the owner of the reversions on the head leases was threatening to enforce the forfeiture against the plaintiff. Thereupon the plaintiff sought to enforce execution of the necessary repairs by Herring, and a correspondence on the subject ensued between the agents of the plaintiff and the solicitor acting for Herring, of which the last two letters were as follows. On April 21, 1903, the plaintiff's agents wrote to Herring's solicitor in these terms: "The time allowed by the notice attached to the schedule of dilapidations served upon this property has now expired; and, unless we can have some satisfactory guarantee from you that the repairs will be completed at an early date, we must instruct the lawyers to start an action of ejectment. We will delay communicating with the lawyers until Friday next, which will give you sufficient time to let us have a reply to this." To this letter the solicitor acting for Herring replied as follows: "I have received your letter of yesterday. You have already been informed that the builder is carrying out the repairs, and this is being done as fast as it reasonably can. If this does not satisfy you, you may take any course you choose, and I am prepared to accept service."

The plaintiff subsequently brought the four actions above mentioned, naming as defendants in the respective writs of summons the various weekly tenants of the houses, the whole number of defendants named amounting to over a hundred. Copies of the writs in the respective actions were served upon the various defendants in each action respectively. Herring obtained leave to appear and defend the actions as the landlord of the defendants. The weekly tenants did not appear, and no further proceedings in the actions were taken against them. Subsequently, having put the houses into a state of repair, Herring made an application at chambers for relief against

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the forfeiture in each action. An order was made by the master by consent in each action in the following terms: "On reading the affidavit of the defendant George Herring, [and other affidavits], by consent, and the plaintiff accepting the statement of the said defendant that the freeholder is satisfied as to the repairs carried out by the said defendant, it is ordered that the said defendant George Herring be relieved from the forfeiture, if any, of the lease dated . . . . and all further proceedings in this action be stayed (except for the purpose of enforcing this order), the said defendant George Herring paying to the plaintiff his costs as between solicitor and client of this action, and the proceedings for relief and surveyor's fees in respect of the service of notice and preparation of the specification incurred before action brought, to be taxed."

The plaintiff's bill of costs carried in for taxation contained items in each action in respect of costs of copies of the writ for service on each of the various defendants named in the writ and of service of the same.

On taxation of the costs it was contended for the defendant Herring that the above-mentioned items ought not to be allowed, and that the costs of one action only ought to be allowed, on the ground that under the circumstances it was unnecessary to make the weekly tenants defendants and that there should have been one action only in which Herring should have been made the sole defendant. The master taxed the costs in each of the actions, and (inter alia) allowed the items for copies of the writs for service on each of the weekly tenants, but only allowed as for service on them of notices, and not of writs.

On appeal Bruce J. refused to direct a review of taxation.

Montague Lush, K.C., and *C. Herbert-Smith*, for the defendant Herring. It was wholly unnecessary in this case to bring four actions against all the weekly tenants of the houses, and one action against Herring as sole defendant should have been brought. The scope of the action was really to enforce the repair of the premises, and it is never the

practice that weekly tenants should execute repairs. It may be the usual practice, and no doubt in many cases be necessary, to make the persons actually in occupation as tenants the defendants in an action for recovery of land: as for example where there is a question of their setting up an independent title in themselves, or where the plaintiff cannot ascertain the state of the title to a lease; but in the present case the plaintiff was well aware, or at any rate might easily have ascertained on inquiry, that the sub-leases were vested in Herring, and the real object of the actions would have been attained by one action against him alone. Though the orders for relief provide that the plaintiff is to have the costs of the action as between solicitor and client, that does not deprive the master of the jurisdiction to disallow costs improperly, vexatiously, or unnecessarily incurred, which is given by Order LXV., r. 27, sub-r. 20. There is no provision by which it is rendered necessary in all cases to make the persons actually in possession the defendants in an action for recovery of land. There is no special provision on the subject with regard to such actions in the rules, and the practice must therefore be governed by the ordinary rules and practice as to actions in general, which merely require service of the writ on such person or persons as it is sought to make defendant or defendants in an action.

[They cited *Minet* v. *Johnson*. (1)]

Danckwerts, K.C., and *Holman Gregory*, for the plaintiff. Order LXXII., r. 2, provides that, where no other provision is made by the Judicature Acts or Rules, the previously existing procedure and practice are to remain in force. Sect. 168 of the Common Law Procedure Act, 1852, provided that the writ in an action of ejectment should be directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed.

[STIRLING L.J. A landlord may be in possession by his tenants. Could not the action have been brought against Herring alone?]

It may be admitted that the action could have been so brought, but the question is whether the plaintiff was not

(1) (1890) 63 L. T. 507.

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entitled under the ordinary procedure to make the tenants in actual possession the defendants. The books of practice appear to lay it down as being the ordinary practice that the action should be brought against those in actual possession of the land: see Cole on Ejectment, 83; Woodfall on Landlord and Tenant, 16th ed. 846; see also per Lindley L.J. in *Minet* v. *Johnson*. (1) There is a certain amount of risk involved in not making the persons in actual possession defendants; for when the sheriff, upon judgment being obtained, executes the writ of possession, he will turn out these persons, who may bring actions against the plaintiff for wrongful dispossession, not being bound by the judgment.

[MATHEW L.J. That may possibly be so where there is any question of an independent title in them, but here it appears to have been known to the plaintiff, or he might without difficulty have ascertained that the sub-leases were vested in Herring, and the occupiers were his tenants.]

It is submitted that it cannot be deemed unreasonable that the plaintiff should have followed what is laid down in all the books to be the usual practice in actions for recovery of land.

Furthermore, the defendant Herring cannot now raise these objections to the taxation. The time to have raised any objection to the form of the actions, and the fact that four actions were brought, was upon the summonses for relief. The defendant Herring consented to an order in each action that the plaintiff should have his costs of the action as between solicitor and client. The costs of the action referred to in the order are the costs of the action as actually constituted, namely, the action against the weekly tenants as defendants.

C. Herbert-Smith, in reply, referred to Foa's Landlord and Tenant, 3rd ed. 698.

Cur. adv. vult.

Dec. 2. STIRLING L.J. This is an appeal against an order of Bruce J. refusing to interfere with the master's taxation of costs in four actions brought to recover possession of a large number of houses in the following circumstances. It

(1) 63 L. T. 507.

appears that four leases for long terms, each of which comprised a portion of the houses of which possession is sought to be recovered in the actions, had originally been granted by the freeholder; and these four leases had become vested in the plaintiff. Four underleases, each comprising the houses comprised in the respective leases, had been granted by predecessors in title of the plaintiff, all of which underleases had become vested in the defendant Herring, who had sublet the various houses to weekly tenants. In 1903 the houses appear to have been in a bad state of repair; and the freeholder was threatening the plaintiff with proceedings to enforce the forfeitures incurred by reason of the breach of the covenants to repair contained in the leases. The plaintiff through his agents put himself in communication with Herring, and a correspondence ensued with regard to the dilapidations, of which I need only refer to the last two letters. [The Lord Justice then read the letters set out above.] These letters are important as shewing that the plaintiff was looking to Herring as the person who ought to do the repairs, and was pressing him to do them; and that Herring was ready to meet any proceedings which might be taken by reason of the non-repair of the demised property. In that state of things the plaintiff proceeded to bring four actions, one in respect of each set of houses comprised in the underleases respectively, not against Herring, but against the various weekly tenants, 119 persons in all, who were in occupation of the houses. Herring, on becoming aware of the actions, obtained leave to appear and defend them. Four statements of claim and four defences were delivered, and four summonses were taken out for relief against the forfeiture of the sub-leases; and ultimately four orders were made giving such relief, all being in similar terms. [The Lord Justice here read the terms of one of the orders as above.] The taxation of the costs subsequently took place; and objections to the taxation of the master were carried in with regard to two matters, which are as follows: first, it is said that in each action the costs of service of the writ upon each of the weekly tenants were unnecessarily incurred, and ought to be disallowed; and, secondly, it is said that it was

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unnecessary to bring four actions, and therefore only one set of costs ought to be allowed. The master dealt with these matters as follows: he allowed in each action the costs of the copies of the writ for service on each of the weekly tenants, and the costs of service of the same on the scale applicable to service of notices; and as to everything else he disallowed the objections. The judge has refused to interfere with his decision, and the case is now brought before us on appeal; and the question is whether the decision of the master can be upheld, and, if not, what relief can be given to the defendant Herring.

As regards both objections taken to the taxation, it is contended for the plaintiff that, the orders for relief against the forfeiture having been made by consent, they are binding upon the Court, and preclude us from going into the matter.

As regards the first head of objection, I do not think that this contention is well founded. The master is no doubt directed by the orders to tax the plaintiff's costs as between solicitor and client in each action, but that does not, I think, deprive him of the jurisdiction given by Order LXV., r. 27, sub-r. 20, to disallow the costs of any proceeding which is improper or unnecessary. The question therefore is whether the costs of serving all the weekly tenants with writs or notices in these actions were unnecessarily incurred, and therefore ought to be disallowed. In my opinion these costs were unnecessarily incurred, and therefore ought to be disallowed. It was urged that the form in which these actions were brought was a common form. Doubtless it is a common practice in actions for the recovery of land to sue the tenants in actual occupation of the property, and not their landlord; but in every case I think regard must be had to the circumstances. It was not disputed, and I think rightly so, by the counsel for the plaintiff that the action for recovery of these houses would have been well brought against Herring alone, without joining his weekly tenants. It appears to me that, regard being had to the real object of the actions, that would have been the proper course. The object appears really to have been to secure the doing of the necessary repairs, and not to recover

possession of the property. That object would have been readily attained by issuing the writ against Herring alone, not making his tenants parties to the action. Therefore I think the master was right in refusing to allow costs as for the service of writs upon the weekly tenants; but I think he ought to have gone further, and treated the service upon those tenants as altogether unnecessary as matters stood. For these reasons I think that the objection to his taxation so far as it relates to the allowance of these items in each action ought to be allowed.

The remaining question is as to the allowance of the costs of four actions. It follows from what I have said that, inasmuch as the weekly tenants were unnecessary parties to the action, and Herring alone should have been made defendant, only one action was necessary; but I think that the form of the orders made by consent is a bar to our giving effect to this conclusion. We have ascertained from the master that the orders were really made by consent. If the defendant Herring chose to submit in each action to an order which gives the plaintiff his costs of that action as between solicitor and client, I do not see how we can interfere. I regret this result, but it seems to me that it is the defendant's own fault. Therefore this appeal must be allowed to the extent which I have mentioned, but no further.

MATHEW L.J. I am of the same opinion. This case appears to me to be of some importance, as enabling the Court emphatically to negative the contention that the plaintiff was entitled to take the course which he adopted in this case. It was insisted that he had a right, according to the ordinary procedure in actions for recovery of land, to insert in the writ the names of all the weekly tenants who were in actual occupation of the houses; and, in accordance with that contention, he brought four actions in which he made 119 persons defendants, when one action against one defendant would have sufficed. I am of opinion that the plaintiff had no such right as he claims. He was proceeding in respect of an alleged forfeiture of the sub-leases, of which Herring was assignee, and under the circumstances there was no reason for adding as

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defendants persons whose title was altogether dependent upon that of Herring. Unfortunately the defendant Herring consented to an order in each of the four actions giving the plaintiff the costs of the action. I was disposed to think that possibly these orders, though expressed to be made by consent, were not really intended to prejudice the right of the defendant Herring to take exception to the allowance of the costs of four actions; but on reference to the master on this subject he reports that, according to his recollection, the orders were wholly made by consent, and the defendant Herring is therefore estopped by their terms; and consequently the taxation of costs must be in accordance with the orders, subject to the modification which my brother Stirling has mentioned.

Appeal allowed in part.

Solicitors for plaintiff: *Surr, Gribble & Oliver.*
Solicitor for defendant: *Seaton Taylor.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1904
Dec. 7.

MOUNT LYELL MINING AND RAILWAY COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp Duty — "Marketable Security" — Debenture — "Given in Substitution for a like Security" — Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

The appellant company, incorporated under the laws of Victoria, was formed to take over the assets and liabilities of two existing companies, one of which was a company registered in England having an issue of debentures. The holders of these debentures by agreement delivered them up, and accepted in lieu thereof debentures of an equivalent amount issued by the appellant company:—

Held, that the debentures of the appellant company were not "given in substitution for a like security" within the meaning of sub-head 4 of the heading "Marketable Security" in the 1st schedule to the Stamp Act, 1891, and were therefore liable to bear stamp duty to the full amount.

APPEAL from the judgment of Channell J. upon a case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891. (1)

The facts stated in the case were as follows:—

On October 12, 1903, an instrument was presented on behalf of the Mount Lyell Mining and Railway Company, Limited (hereinafter called the appellant company), to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

In 1899 the North Mount Lyell Copper Company, Limited (hereinafter called the North Company), being a company registered under the Companies Acts, 1862 to 1893, issued under the seal of the company a series of debentures of varying amounts, whereby they promised to pay to bearer, or, when registered, to the registered holder, the respective amounts thereof. In order to secure such debentures a trust deed was

(1) [1904] 1 K. B. 757.

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on December 7, 1898, executed between the North Company of the one part, and General Sir Hugh Gough and William Jacks (as trustees for the debenture-holders) of the other part, containing the conditions usual in such trust deeds.

By an agreement dated May 22, 1903, made between a company called the Mount Lyell Mining and Railway Company, Limited (being a company registered under the laws of the State of Victoria) of the one part, and the North Company of the other part, it was provided that a new company should be incorporated to take over the assets and liabilities of the companies parties thereto, including the liability of the North Company to the debenture-holders, to whom debentures in the new company were to be given as therein provided. By a subsidiary agreement dated June 18, 1903, made between Daniel James Mackay (on behalf of all the holders of the outstanding debentures of the North Company) of the one part, and the North Company of the other part, it was (amongst other things) provided that every holder of debentures of the North Company should deliver up the debentures held by him and accept in lieu thereof debentures of an equivalent amount in the new company to be formed as aforesaid; such debentures were to be framed and secured as therein mentioned, and by clause 5 the delivery of such substituted debentures was to be accepted in satisfaction of the liability of the North Company to him under the said debenture trust deed and debentures.

By an agreement dated August 6, 1903, and made between the aforesaid Mount Lyell Mining and Railway Company, Limited, of the State of Victoria of the first part, the North Company of the second part, and Alfred Mellor, on behalf of a new company which it was contemplated should be formed under the laws of the State of Victoria, under the style of the Mount Lyell Mining and Railway Company, Limited (the appellant company), of the third part, it was agreed to sell the respective undertakings of the old companies to the appellant company when incorporated, and as to the assets of the said North Company subject to the existing mortgage debentures to be satisfied by the issue of debentures of the appellant company as therein provided.

On August 11, 1903, the appellant company was duly incorporated under the laws of the State of Victoria, in the Commonwealth of Australia, and by deed of that date it duly adopted under seal the last-mentioned agreement.

A holder of one of the above-mentioned debentures issued by the North Company surrendered such debenture at the office of the appellant company in London, and in lieu thereof received the debenture under the seal of the appellant company which was the subject of adjudication. In accepting such new debenture he acted under the agreement of June 18, 1903, and he thereby released and gave up all right against the North Company and all rights in respect of the first-mentioned debenture. The appellant company contended that the instrument in question fell to be charged only with substituted security duty at the rate of 6*d.* for every 20*l.* thereof.

The Commissioners, being of opinion that the instrument in question was a marketable security, being a security transferable by delivery, and bearing date after August 6, 1885, by reference to the heading "Marketable Security," sub-head 3, in the 1st schedule to the Stamp Act, 1891 (1), and that it was not within the fourth sub-head of that heading, assessed the duty at 1*s.* for every 10*l.* and for every fractional part of 10*l.* of the money thereby secured. The appellants being aggrieved at the decision, the Commissioners, at the request of the appellants, stated this case for the opinion of the Court.

The questions for the opinion of the Court were: (1.) Whether the assessment of the Commissioners was correct. (2.) If not, to what duty the instrument was liable.

Channell J. gave judgment for the Crown. (2)

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), First Schedule: "Marketable Security."—(3.) "Marketable security (except a Colonial Government security) being a security transferable by delivery and bearing date or signed or offered for subscription after August 6, 1885.—For every 10*l.* and also for any fractional part of 10*l.* of the money thereby secured—1*s.*" (4.) "Marketable security (except a Colonial Government security) being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty.—For every 20*l.* and also for any fractional part of 20*l.* of the money thereby secured—6*d.*"

(2) [1904] 1 K. B. 757.

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W. F. Hamilton, K.C. (*E. J. Elgood* with him), for the appellants. The debenture in question was given "in substitution for a like security" within the meaning of sub-head 4 of the heading "Marketable Security" in the 1st schedule to the Stamp Act, 1891. "Like security" in that sub-head merely means security "such as last aforesaid," namely, a security which would be subject to the stamp duty under sub-head 3 as being "a security transferable by delivery, and bearing date, or signed, or offered for subscription, after August 6, 1885." It is submitted that this is the plain grammatical construction of the language used; but, if the words are ambiguous, they ought to be construed in the sense favourable to the subject. It is immaterial that another company, which is a Colonial and not an English company, is liable on the substituted instrument, and that different property may be charged as security for the debentures. Under the heading in question the term "Marketable Security" refers to the document, and not to the obligation evidenced thereby, or to any charge on property which may be thereby given as security. Any instrument which in popular commercial parlance would be called a security, if marketable, would be included under that heading, though it did not give a charge on any property by way of security. The words "in substitution for" are used merely in the sense of "in exchange for" or "in place of"; and sub-head 4 covers all cases in which one security coming within sub-head 3 is given in exchange for another security which would come within the same sub-head. In s. 1 of the Stamp Act, 1891, the words "in substitution for" are used as meaning "in the place of." That section provides that the duties specified in the Act are to be "in substitution for" the duties theretofore chargeable, which were different duties. *City of London Brewery Co.* v. *Inland Revenue Commissioners* (1) is distinguishable, for in that case the old debenture stock remained unextinguished, and therefore the new could not be said to be substituted for it.

Sir R. B. Finlay, A.-G. (*S. A. T. Rowlatt* with him), for the Crown. The words "given in substitution for a like security"

(1) [1899] 1 Q. B. 121.

in sub-head 4 contemplate a case in which, as between the same parties, a new security of substantially the same character is given in substitution for an old one. The case aimed at is the common case in which a company for some reason issue a new series of debentures in place of an old one. What is dealt with is the substitution of securities, not that of persons liable. There cannot be said in this case to have been a substitution of a security for a like security in any proper sense of the words. In sub-head 2 of the heading "Mortgage, Bond, Debenture, Covenant (except a marketable security otherwise specially charged with duty)," in the 1st schedule of the Act, we find the term "substituted security" used in a manner which clearly shews that what is contemplated is a security given by the same person who was liable on the security for which it was substituted.

W. F. Hamilton, K.C., in reply. Sub-head 2 of the heading "Mortgage, &c.," is dealing with securities which are such in the proper legal sense of the term, as being charges on property. The heading "Marketable Security, &c.," as already pointed out, deals, not with the charge given by an instrument, but with the document or instrument itself, which is saleable in the market, and therefore the same considerations do not apply as in the case of mortgages. It is true that the party liable under the new debentures is the new Colonial company, and not the old English company, but the assets and undertaking of the latter, which formed the security for the old debentures, were transferred to the new company; and therefore, though technically the new company is a different person from the old English company, substantially the new security is identical in character with the old.

COLLINS M.R. This is an appeal from a judgment of Channell J., and the point lies in a very small compass. An English company had issued debentures, which had been duly charged under sub-head 3 of the heading "Marketable Security" in the 1st schedule to the Stamp Act, 1891, with a stamp duty of 1*s.* for every 10*l.* of the money thereby secured. Subsequently an arrangement was made, which appears to be

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in the nature of a novation, whereby the debenture-holders of the English company accepted in exchange for their debentures fresh debentures issued by the Colonial company to an equivalent amount.

It is contended that a debenture issued as last mentioned comes within sub-head 4 of the heading "Marketable Security" in the schedule, as being a "marketable security . . . . being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty"; and therefore that it is only subject to a duty of 6*d.* for every 20*l.* of the money thereby secured. The validity of that contention depends upon the question whether a debenture of the Colonial company which is given in exchange for a debenture of the English company, as being the security of another debtor, and secured probably on different property, can be said to be a security "given in substitution for a like security" within the meaning of those words as used in sub-head 4. It seems to me that the use of the word "like" in that context must import that the debtor in each case is to be the same, and that an exchange of an obligation of one person for that of another person, secured on different property, cannot be said to be a substitution of a security for a like security within the meaning of the sub-head. The learned judge in the Court below, in dealing more particularly with the words "a like security," relied upon the fact that the conditions under which a debenture of a Colonial company and that of an English company respectively become liable to stamp duty are different. I do not think that consideration can be ignored; for the question whether one security is like another must, I think, embrace all the factors in respect of which they may agree or differ. As the fact that one security is given by one debtor and another by another renders them unlike in that respect, so the fact that different conditions are under s. 82 of the Act applicable in reference to the liability to duty in the case of a debenture of a Colonial company, and that of a debenture of an English company, respectively, must be a factor in determining whether the two things so nearly approach one another that they can be said to

be like securities for the present purpose. The appellants' counsel has relied on the fact that in s. 1 of the Stamp Act, 1891, the word "substituted" is used as equivalent to "in exchange for," or "in the place of"; but, in a portion of the Act much more nearly connected with that which is now in question, namely, the heading "Mortgage, Bond, Debenture, Covenant (except a marketable security otherwise specially charged with duty)" in the 1st schedule, we find the word "substituted" used in relation to a security in a manner which, though it may involve a substitution of property charged, seems to exclude a case in which the two securities are given by different persons. It was argued that an analogy drawn from the case of instruments which are securities in the proper sense of the term, as involving a charge upon property, has no application to the present case, and cannot govern the question, what constitutes a substitution for a like security in the case of securities which do not involve any charge on property. I do not follow that reasoning. Although an instrument which is merely a personal security may be within the heading "Marketable Security" in the 1st schedule, that heading would also embrace instruments by which a charge on property is given; and I do not see how, in the case of such instruments, a security can be said to be substituted for a like security, where the securities are not given by the same person, and probably the property charged is not the same. I do not think that, as suggested, the mere fact that the same duty would be payable on one security as upon another makes them like securities. All the circumstances with regard to the two securities must be considered; and I do not think that a security can be said to be given in substitution for a like security when a security is exchanged for one which is given by a different person and probably secured on different property. For these reasons I think the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The question in this case is whether a debenture issued by the appellant company comes within sub-head 3 of the heading "Marketable

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Security" in the 1st schedule to the Stamp Act, 1891, in which case the proper stamp duty is 1*s.* for every 10*l.* of the money thereby secured, or within sub-head 4, in which case the proper stamp duty is 6*d.* for every 20*l.* of the money thereby secured. Sub-head 4 is as follows: "Marketable security (except a Colonial Government security) being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty." To my mind the question really depends upon the meaning of the words "given in substitution for" a like security in sub-head 4 of the schedule. It was contended that "in substitution for," as there used, means "in the place of" in the widest sense. In support of that contention reference was made to the use of the same words in s. 1 of the Stamp Act, 1891, which provides that the duties specified in the Act shall be "in substitution for" those theretofore chargeable. On the other hand it was pointed out that the word "substituted" has a less wide meaning when used in connection with the stamp duty under the heading "Mortgage, Bond, Debenture, Covenant (except a marketable security otherwise specially charged with duty)" in the 1st schedule. The words used in sub-head 2 of that heading are "being a collateral, or auxiliary, or additional, or substituted security." It appears to me that the word "substituted" as used there is equivalent to the words "given in substitution for" used in sub-head 4 of the heading "Marketable Security." This seems to me to be shewn by the use of the word "substituted" in the exemption which follows the 5th sub-head of the heading "Marketable Security." The typical case of a "substituted security" for the purposes of sub-head 2 of the heading "Mortgage, &c.," is one in which the parties to the transaction remain the same, but, one piece of property having been released from the charge, another piece of property is by some instrument made subject to a charge for the same debt, in which case that instrument may be said to be a "substituted security." It seems to me that the use of the word "substituted" in that sub-head throws some light on the meaning of the words "given in substitution for" in the portion of the schedule

with which we are dealing. In my opinion the transaction in this case differs so widely from the type of transaction which appears to be contemplated as a substitution of securities by the Act that the debenture given by the appellant company cannot be said to be a "marketable security . . . . given in substitution for a like security" within the meaning of sub-head 4 of the heading "Marketable Security" in the 1st schedule to the Stamp Act, 1891.

MATHEW L.J. I am of the same opinion. The main contention for the appellants was that, in order to constitute the debentures in question like securities for the purposes of sub-head 4 of the heading "Marketable Security" in the 1st schedule to the Stamp Act, 1891, it was sufficient that they should be securities so far alike in form as to be subject to the same stamp duties. I cannot so interpret the Act. I think that, in order to see whether one security is like another for its purposes, there must be an inquiry into the respective characters of the two securities. On such an inquiry in this case it appears that the securities in question are unlike in most important particulars. The parties to the debentures are not the same, and the property on which they are secured would appear to be different. It was argued that, nevertheless, the transaction might properly be said to be a giving of a security "in substitution for a like security," and therefore the language of sub-head 4 applied. I cannot accept that suggestion. It appears to me that the operation carried out in this case was an exchange of one security for another of a different character, which is not the same thing as a substitution of one security for another of a like nature.

Appeal dismissed.

Solicitors for appellants: *James White & Leonard.*
Solicitors for the Crown: *Solicitor of Inland Revenue.*

E. L.

1904
Dec. 5.

In re FANSHAWE.
Ex parte LE MARCHANT.

Bankruptcy — Secured Creditor — Proof — Increase in Value of Security — Amending Proof—Time—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 13.

In 1895 a debtor, against whom a receiving order had been made, lodged a scheme providing for the payment of 10*s.* in the pound to his unsecured creditors, exclusive of M., whom he alleged to be fully secured. The scheme was duly accepted by the creditors. M. took no part in the proceedings, but lodged a proof in which he assessed the value of his security at one-half of the amount of his debt, and claimed to prove as an unsecured creditor for the other half, and his proof was admitted. The scheme fell through in consequence of M.'s proof, which he refused to withdraw, and the debtor's estate paid only 1*s.* in the pound. In January, 1903, M.'s security became greatly increased in value, and in May, 1904, he applied under rule 13 of Sched. II. to amend his proof by revaluing his security on the footing that he was fully secured :—

Held, that M. had done nothing to disentitle himself to the relief he claimed, and that his application must be granted.

THIS was an application by creditors for leave to withdraw their proof and revalue their security under these circumstances :—

In March, 1895, a receiving order was made against the debtor. The first meeting of the creditors was held on April 1, 1895, and the debtor in his statement of affairs returned the applicants as fully secured creditors for 5200*l.* In May, 1895, the debtor lodged a scheme of arrangement under which some friends were prepared to provide a sum sufficient to pay his unsecured creditors 10*s.* in the pound. This scheme was duly approved at a meeting of the creditors held on June 18, 1895.

The applicants were mortgagees of the real estates of the debtor subject to certain prior incumbrances. They did not attend any of the meetings of the creditors, but on July 3, 1895, they lodged a proof in which they put their total debt at 5208*l.*, and assessed the value of their security at 2604*l.*, and claimed to prove as unsecured creditors for the remaining half of their debt. Correspondence then ensued between the

solicitors of the applicants and the solicitors of the debtor, in which the applicants were pressed to withdraw their proof, partly on the ground that they were fully secured, and partly on the ground that unless the proof were withdrawn the scheme of arrangement would fail and there would be no dividend for the general body of the creditors. The applicants declined to withdraw their proof, and it was admitted at 2604*l.* Consequently the scheme was abandoned, the debtor was adjudicated bankrupt, and his estate paid a dividend of only 1*s.* in the pound, which the applicants received on their said proof. At this time the equity of redemption in the applicants' mortgage was considered to be of no value.

One of the incumbrances having priority over the applicants' security was a jointure of 300*l.* per annum in favour of the bankrupt's wife contingent on her surviving him. She died in January, 1903, and consequently their security was greatly increased in value. In December, 1903, the bankrupt died.

In May, 1904, the applicants applied under rule 13 of Sched. II. for leave to amend their proof and the valuation of their security on the footing that they had become fully secured. The trustee refused to give leave without the sanction of the Court.

Muir Mackenzie, for the applicants. Under rule 13 a creditor can revalue his security "at any time" before actual redemption by the trustee: *Ex parte Norris* (1); *In re Newton.* (2) In the present case the applicants are not too late, and they have done nothing to deprive themselves of their right.

Hansell, for the trustee. *Ex parte Norris* (1) shews that some limit must be placed on the words "at any time." Here, after the event happened that increased the value of the mortgage, there is an unexplained delay of nearly sixteen months before the applicants moved in the matter. It is submitted that they should have applied promptly after the event happened. Secondly, the Court will not allow amendment when the position of the parties has been fixed by what has previously occurred: *In re Newton* (2); *In re Safety Explosives*

(1) (1886) 17 Q. B. D. 708. (2) [1896] 2 Q. B. 403.

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Co. (1) Here, the rights of all parties were fixed in 1895 by the applicants proving as unsecured creditors for 2604*l.* It was their refusal to withdraw their proof that caused the scheme of arrangement to fail, and they thus deprived the general body of the unsecured creditors of the 10*s.* in the pound that they would have received under the scheme. It would not now be fair or just to allow the applicants to take away from the unsecured creditors the value of the equity of redemption under the mortgage, which is the only remaining asset in the bankruptcy.

Muir Mackenzie, in reply.

BIGHAM J. In this case the applicants, who are secured creditors, in 1895 assessed the value of their security at one-half of the amount of their debt and proved as unsecured creditors for the remaining half of it. It is not suggested, and I have no reason to suppose, that they did not then act honestly and value their security to the best of their judgment, and it may very well be that their valuation at that time was correct. What was their right at that time? Rule 13 of Sched. II. to the Act provides that where a creditor has valued his security in accordance with the previous rules he may at any time amend the valuation and proof on shewing to the satisfaction of the trustee or the Court that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation. That was the right they then had, and that is the right they are now seeking to assert, and they have satisfied me that their security has greatly increased in value by reason of the jointure ceasing in 1903 to be operative. But it is said that they ought not now to be allowed to amend their valuation because the debtor arranged in 1895 to pay his unsecured creditors 10*s.* in the pound, and that scheme failed solely because the applicants insisted on their proof for 2604*l.* This circumstance is set up as a reason why the applicants should not now be entitled to the benefit of the rule, and reliance is placed on an obiter remark made by

(1) [1904] 1 Ch. 226.

Vaughan Williams J. in the case of *In re Newton* (1), where he says that the rule ought to be construed so as to give the creditor the right to amend "unless by something which has happened the position of the trustee and the creditor has become so altered that the rights of the parties concerned may be considered to be fixed on the basis of the alteration." I take it that the "trustee" there represents the unsecured creditors, and the word "creditor" means the secured creditor. But I do not think that that obiter dictum applies to the present case, because it seems to me that nothing these secured creditors did in 1895 has taken away from them the right they now insist upon. I am at a loss to understand why the fact that the debtor failed to carry his scheme should deprive the applicants, who acted in good faith, of the right they now have of revaluing their security. The application will be granted, but the applicants must repay the dividend they received with interest at 4 per cent., and also pay the costs of the application.

Solicitors: *Farrer & Co.; Munns & Longden.*

(1) [1896] 2 Q. B. 403.

H. L. F.

C. A.
1904
Dec. 9.

[IN THE COURT OF APPEAL.]

THE UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp — Conveyance — Ad Valorem Duty — Consideration — Consideration payable on Contingency—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), *s.* 56, *sub-s.* 2; *s.* 57.

A company agreed to sell its undertaking to a new company in consideration of certain money and shares, and it was agreed that the profits of the new company in respect of each year should be applied, first, in the payment of a cumulative dividend of 5 per cent. per annum on the amount for the time being paid up on any shares for the time being issued by the new company; and, secondly, in paying to the original company, "as a further part of the consideration for the said sale, such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital . . . . in the new company as shall for the time being have been issued by the new company":—

Held, that the further consideration, though payable contingently, was "money payable periodically in perpetuity or for an indefinite period not terminable with life" within the meaning of s. 56, sub-s. 2, of the Stamp Act, 1891, and was chargeable with ad valorem duty.

Judgment of Channell J., [1904] 2 K. B. 198, reversed.

APPEAL from a judgment of Channell J. upon a case stated by Commissioners of Inland Revenue, reported [1904] 2 K. B. 198.

The question as to the amount of stamp duty payable by the appellants arose under an agreement between the Metropolitan District Electric Traction Company, Limited, therein called the traction company, and the appellants, therein called the new company.

By the first clause the traction company were to sell and the new company to purchase the entire undertaking of the traction company.

Clause 2 stated that part of the consideration for the sale should be two several sums payable in cash and in shares

respectively, subject to certain specified deductions. Upon this clause, which is set out in the report below, no question was in controversy with regard to the amount of stamp duty payable in respect of so much of the consideration as was payable under that clause.

Clause 3 provided: "The profits of the new company available for dividend in respect of each year shall be applied in the following order and manner—that is to say:—

"First. In payment of a cumulative dividend at the rate of 5 per cent. per annum up to the end of such year on the amount for the time being paid up on any shares for the time being issued by the new company; and

"Secondly. In paying to the traction company or its assigns as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of 5,000,000*l.* in the new company as shall for the time being have been issued by the new company."

The Commissioners found that at the date of the agreement the whole of the ordinary share capital of the new company to the amount of 5,000,000*l.* had been issued, and that the amount paid up was 1,300,000*l.*, upon which sum a dividend of 3*l.* per cent. for a year would amount to 39,000*l.*

The Commissioners were of opinion that the sum contingently payable out of profits in each year under clause 3, sub-clause 2, was part of the consideration for the sale, and that, so far as such sum was capable of ascertainment at the date of the agreement, it was liable to ad valorem conveyance duty at the rate of 10*s.* per cent. They were of opinion that the sum of 39,000*l.* arrived at as above mentioned was, under the terms of the agreement, "money payable periodically . . . . either in perpetuity or for an indefinite period not terminable with life" within the meaning of s. 56, sub-s. 2, of the Stamp Act, 1891, and consequently came within the provision of that sub-section that "the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may, according to the terms of sale, be payable

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during the period of twenty years next after the day of the date of the instrument." They therefore applied the provisions of that sub-section, and multiplied the sum of 39,000*l.* by 20, making a sum of 780,000*l.*, the duty on which, at 10*s.* per cent., amounted to 3900*l.*; and that sum they assessed as the duty payable in respect of the further consideration mentioned in clause 3, sub-clause 2, of the agreement. At the request of the railway company, a case was stated upon which the company appealed.

On argument before Channell J. judgment was given for the appellants.

The Commissioners appealed.

Sir R. B. Finlay, *A.-G.*, and *S. A. T. Rowlatt*, for the Commissioners. The fact that the payment of this part of the consideration for the sale to the new company depends on a contingency does not prevent the duty from attaching. No doubt there is the contingency that before the traction company can be paid in any year any portion of this part of the consideration, the new company must have earned enough to pay the 5 per cent. mentioned in the first sub-clause; but there is no ambiguity with regard to the amount payable annually. That sum has been correctly estimated at 3 per cent. on the amount of paid-up capital at the date of the agreement, and on that footing the consideration payable under clause 3, sub-clause 2, of the agreement has been ascertained by multiplying by 20; and on that amount the duty is payable.

A similar point arose in the case of a mortgage in *Mortimore* v. *Commissioners of Inland Revenue* (1), where the debt arising on the mortgage was contingent, and the decision was that the words "mortgage, debt, or sum of money" included contingent as well as absolute debts. In *Canning* (*Lord*) v. *Raper* (2) there was an assignment of chattels to secure to the assignee an indemnity against a payment the necessity for which might not arise, and the deed was held to be subject to a stamp duty as a "security for the repayment of money, to

(1) (1864) 2 H. & C. 838. (2) (1852) 1 E. & B. 164.

be thereafter lent, advanced, or paid." In *Maxwell* v. *Commissioners of Inland Revenue* (1) a settlor in a marriage settlement was bound to pay different sums of money to trustees in favour of his children according to the number that might be born, and the bond was assessed for duty at the maximum amount conditionably payable. In *Onslow* v. *Commissioners of Inland Revenue* (2) a settlement of contingent reversionary interests in certain specified amounts of stock was held to be liable to ad valorem duty under the Stamp Act, 1870. A sale under s. 57 of the Act of 1891 would have involved stamp duty on the whole consideration whether certain or contingent, and it cannot have been intended that the duty should be on a different scale in that section and in s. 56. It is submitted that no distinction can be drawn in principle between this case and those that have been cited. The present case is perhaps stronger than those cited, for the words of the sub-section, "the amount which will or may be payable," in themselves indicate that a contingent payment was contemplated. It is submitted, therefore, that the decision of the Commissioners should be upheld.

[They referred also to *Rowell* v. *Inland Revenue Commissioners*. (3)]

Roskill, K.C., and *Austen-Cartmell*, for the company. Sect. 56, sub-s. 2, deals with definite payments over a period of time which may be either definite or indefinite. This payment is contingent upon enough being earned in a particular year to pay a cumulative dividend of 5 per cent. on the shares for the time being, and on there being a balance over after this is done to pay 3 per cent., or some fraction of 3 per cent., to the traction company. There is thus an uncertainty as to any payment being made, and an uncertainty as to amount if any is paid. It was said that the word "may" in the sentence "ad valorem duty on the total amount that will or may, according to the terms of sale, be payable" shewed that a contingency was contemplated; but that is not so, for the reference is to indefiniteness of time and not of payment.

(1) (1866) 4 M. 1121. (2) [1891] 1 Q. B. 239.
(3) [1897] 2 Q. B. 194.

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There is a distinction in the wording of ss. 56 and 57, for in the latter case contingent payments are specifically dealt with. Mortgages are provided for in ss. 86 to 89, and in s. 88, sub-s. 1, the matter of future advances is specifically dealt with. If it was necessary to have in that case a provision as to the contingency of future advances, and no such provision is found in the clauses relating to conveyances on sale, a provision like that in the former case cannot be read into the latter case. In the Act mortgages, settlements, and conveyances are dealt with separately and in a different way. It follows that the cases that have been cited with regard to mortgages and settlements are no guide in determining what is the meaning of the sections that relate to conveyances; and, further, the cases that have been relied on deal with a definite sum payable on a contingency, and are not authorities in the present case, in which there is no definite amount. The paid-up capital may at any time be increased by calls, or the share capital might be reduced if proper steps were taken, and so "the paid-up capital for the time being" in any given year is an indefinite sum, and that affects the "further part of the consideration" mentioned in clause 3, sub-clause 2, which in its turn becomes too indefinite to be the subject of assessment to duty.

[They referred, in addition to the cases above mentioned, to *Mersey Docks* v. *Inland Revenue Commissioners* (1), *Inland Revenue Commissioners* v. *Liquidators of City of Glasgow Bank* (2), and *Swayne* v. *Commissioners of Inland Revenue.* (3)]

Sir R. B. Finlay, A.-G., in reply. The suggested difficulty as to fluctuations of capital does not arise. There was at the time of the agreement an ascertainable amount of paid-up capital, and that fact cannot be affected by any subsequent transaction with respect to the share capital or the paid-up capital. The Commissioners have ascertained definitely what the latter amount was, and it is on that basis that the sum described as a further part of the consideration for the sale has been ascertained.

(1) [1897] 2 Q. B. 316.
(2) (1881) 8 R. 389.
(3) [1899] 1 Q. B. 335; [1900] 1 Q. B. 172.

COLLINS M.R. This is an appeal from the decision of Channell J., the question being as to the stamp duty payable under s. 56, sub-s. 2, of the Stamp Act, 1891, upon a sum of money, the payment of which is provided for by the terms of an agreement between the traction company and the Underground Electric Railways Company.

The question arises upon clause 3 of the agreement under which the profits of the new company available for dividend in respect of each year are to be applied—first, in payment of a cumulative dividend at the rate of 5 per cent. per annum up to the end of such year on the amount for the time being paid up on any shares for the time being issued by the new company; and, secondly—and this is the clause on which the point arises—"In paying to the traction company or its assigns as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of 5,000,000*l.* in the new company as shall for the time being have been issued by the new company." It has been ascertained by the Commissioners that, at the date of the agreement, a sum of 1,300,000*l.* had been paid up on the share capital, and a dividend of 3 per cent. on that sum is 39,000*l.* That being, on the terms of the bargain I have just read, part of the consideration, the question is whether the provisions of the Stamp Act, 1891, are sufficient to reach that, and the provision relied upon is that contained in s. 56, sub-s. 2, of the Act: "Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for an indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument." In this case a part of the consideration unquestionably is the payment which is provided for in the clause of the agreement which I have read: it consists of money, that is the sum of 39,000*l.*, payable annually

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for an indefinite period not terminable with life. Therefore it seems to me that so far that sum appears to fall within the words of the section, and to be chargeable with ad valorem duty, unless the contention of the company is correct. It is said on their behalf that the word "payable" in s. 56, sub-s. 2, refers to money payable absolutely, and cannot be taken to mean money which is payable only upon a contingency. Another point was taken that, before the question of contingency is reached, there must be an ascertained sum in respect of which this duty can be levied, and it is said that, in this case, there is absolute uncertainty about the sum upon which the 3 per cent. dividend would be payable, because that sum is paid-up capital, and the agreement contemplates more capital being paid up over and above the sum then paid up. Upon that ground, it is said, that sum is too indefinite to be the subject-matter of an ad valorem duty; and that a fixed factor is not available in the calculation, inasmuch as the amount is capable of being increased. That objection does not impress me, because if I once find that there is a fixed minimum already reached at the date of the agreement, it does not seem to me that the fact that the minimum may be afterwards exceeded alters the fixity of that which has already been ascertained, namely, the sum below which the capital cannot fall, and the sum, therefore, upon which the 3 per cent. dividend will have to be paid if the other contingencies, which I will deal with in a moment, arise. Therefore that factor of indefiniteness, so far as it rests on the fact that the capital is capable of increase, does not seem to introduce any such uncertainty into the calculation as to prevent the incidence of the taxation.

Then it was further pressed upon us that that minimum amount of paid-up capital is not a certain factor, inasmuch as the company by proper steps might reduce it still further. I think the Attorney-General has given an answer to that objection. He referred to the specific terms under which this obligation is accepted by the buying company, and pointed out that all the capital has been issued and that, whatever proceedings may be taken by the company, the fact of that issue

cannot be annulled. In the same way a certain amount has been paid up thereon, and that fact cannot be altered. He argued that the Crown is entitled to regard the sum ascertained by the Commissioners to have been paid up at the date of the agreement as an absolutely fixed and permanent factor upon which the sum of 3 per cent. will have to be paid, and with this view I agree.

The question remains that the section deals with "money payable," and that expression, it is said, does not embrace money which is only payable on a contingency. If it is once arrived at that the money to which the section refers is money which may be payable on a contingency, I am not in the least pressed by the difficulty that several uncertainties combine to make one contingency. It does not seem to me to matter how many factors that contingency embraces; it is simply one contingency, although a number of things may have to happen in order to bring about the event on which this payment will have to be made. That being so, I think the question really narrows itself down to this—Do the words "money payable" in the section embrace money payable on a contingency?

The argument for the Crown drawn from the use of the word "may" in the section, in support of the suggestion that payment on a contingency was included, has been successfully contested by the counsel for the company; and therefore I do not rely upon that word in coming to the conclusion that the words "money payable" include money payable on a contingency. I come to that conclusion for the same reasons that actuated the Court in the cases that have been cited; no doubt those were cases of mortgage or settlement, but the words were equally absolute and did not in themselves import any contemplation of contingency, but they were nevertheless held to cover payments upon a contingency. *Canning* (*Lord*) v. *Raper* (1) was a case of a mortgage, in which it was expressly decided that a security for contingent future payments was as much within the meaning of the words "repayment of money to be thereafter lent, advanced, or paid" as an absolute security would be. It does not seem to me that the fact that the

(1) 1 E. & B. 164.

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subject-matter of the contract between the parties was one of a loan upon security makes any difference or lends itself to any suggestion that the word "debt" should have any different meaning in the case of a conveyance from that given to it in the case of a mortgage, nor do I think any argument can be based on the fact that "debt" was the word to be considered in that case, and "money payable" is the expression in this case. It seems to me that the arguments which induced the Court to hold that "debt" covered a debt not payable of necessity in any event, but payable only on a contingency, apply equally to the words "money payable," and I can see no virtue in the fact that one decision cited by the Attorney-General was on a settlement, another on a mortgage, and a third on a combination of both a settlement and a mortgage. It is true that these different classes of instruments are dealt with in certain fasciculi of clauses in the statute, but it does not seem to me that there is any particular significance in the position of the sections which deal with these different subject-matters. The question is the principle underlying the construction of the Act, and it seems to me that we can get at a definite principle from those cases. The principle is that the word "debt" applies to money payable whether upon a contingency or as an absolute and unconditional certainty, and this principle is equally applicable to the words in this section. It seems to me, therefore, that the words "money payable for an indefinite period" include money which may never become payable unless the particular event happens—that is, in this case, unless the amount of profits is sufficiently large to make all the preliminary payments before the obligation to pay a sum equivalent to a 3 per cent. dividend arises. Unless and until that condition is fulfilled the money will not be paid: still it is money which will become payable if that event happens, and therefore it is covered in my judgment by the wording of the section, and the duty is payable. In my opinion, therefore, this appeal succeeds.

STIRLING L.J. I am of the same opinion. The question is whether this case has been brought within s. 56, sub-s. 2, of

the Stamp Act. That section provides that, "Where the consideration for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may according to the terms of sale be payable during the period of twenty years next after the day of the date of the instrument." Part of the consideration in the present case consists of a sum payable out of the profits of a company, a sum equal to a dividend of 3 per cent. in any year upon the amount for the time being paid up on such of the original ordinary share capital in the new company as shall for the time being have been issued. It has been ascertained that at the date of the agreement the original ordinary share capital had been issued, and a definite sum had been paid up. The Commissioners held that the dividend of 3 per cent. payable on that portion of the capital so paid up constituted money payable periodically either in perpetuity or for an indefinite period within the meaning of the section. I think that that conclusion was right. We start with this, that the consideration is to be payable periodically. Now it is insisted, and this is really the basis of the argument on behalf of the company, that the expression "money payable periodically" is limited to money payable absolutely; but I see nothing in the Act which compels us to arrive at that conclusion. The words seem to me capable of including money payable either absolutely or on a contingency, just as much as the word "debt" occurring in various sections of the Stamp Acts has been held to include a debt payable either certainly or upon a contingency. If that be so, there is nothing in the subsequent part of the sub-section which would narrow the meaning of the words "money payable periodically." In fact, the subsequent language is such as lends itself to the view that it includes money payable contingently as well as absolutely. I refer to the words "will or may" which were relied upon by the Attorney-General in his opening, and which, at all events, do not tend to negative the construction which was placed on the words "money payable periodically" by the Commissioners.

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In these circumstances I think that the Crown has made out its case, and the appeal ought to be allowed.

MATHEW L.J. I agree for the reasons given by my learned colleagues.

Appeal allowed.

Solicitors for company: *Bircham & Co.*

Solicitor for Commissioners: *The Solicitor of Inland Revenue.*

A. M.

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[IN THE COURT OF APPEAL.]

THE ALIANZA COMPANY, LIMITED, APPELLANTS; BELL (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Nitrate Grounds situate Abroad—Profits and Gains—Deduction to meet Exhaustion of Material—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First Case, Rule* 3.

The appellants, an English company, were the owners of land in Chili containing deposits of a substance called caliche, from which they extracted by a process of manufacture nitrates and iodine for the market. When the whole of the caliche is exhausted, the land and the machinery and plant used in the manufacture would practically be of no value:—

Held, that in computing their profits for income tax the appellants were not entitled to deduct any yearly sum to meet the exhaustion of the caliche.

Judgment of Channell J., [1904] 2 K. B. 666, affirmed.

APPEAL from a judgment of Channell J., reported [1904] 2 K. B. 666, upon a case stated by Commissioners of Income Tax.

The appellants are an English company incorporated under the Companies Acts and having a registered office in London. They are the owners of land at Alianza, in the Republic of Chili, with the buildings and machinery thereon, and they also own for the purposes of their business a short line of railway. The chief value of the land consists in a substance called "caliche," which is found in deposits either at or close to the surface, and in layers about six feet in depth. The caliche is

dug up and taken to the works of the company, and from it are extracted nitrates of soda and potash and iodine, and from the sale of these the whole of the gross profits of the appellants are derived. The exact amount of caliche used in any year can be ascertained without difficulty, and when the whole has been worked out and exhausted the land, machinery, and plant will be of little value. An assessment having been made upon the appellants under Sched. D of the Income Tax Act for the year ending April 5, 1901, based on their printed accounts for the three preceding years, they appealed to the Commissioners of Income Tax, claiming to be entitled, for the purpose of computing the balance of their profits and gains, to deduct a yearly sum to meet the exhaustion of the nitrate grounds. The Commissioners disallowed the claim and confirmed the assessment, but stated a case for the opinion of the Court.

Upon argument Channell J. dismissed the appeal. (1)

The appellants further appealed.

Dec. 8. *Danckwerts*, *K.C.*, and *Bremner*, for the appellants. It must be admitted that, if these nitrate grounds were situate in this country, the appellants, as owners of them, would be subject to income tax in respect of them as property under Sched. A, under which schedule the assessment is upon the annual value of the property, and of course no deduction could be made in respect of the cost of the property. These lands, however, being situate abroad, the appellants are not assessable to income tax in respect of them under Sched. A. But, inasmuch as the appellants are an English company carrying on business in England in the sense that their business is managed and directed here, they are subject to income tax under Sched. D upon the profits of the business so carried on in accordance with the decisions in *London Bank of Mexico and South America* v. *Apthorpe* (2) and *San Paulo (Brazilian) Railway* v. *Carter*. (3) The tax having, under Sched. D, to be assessed on the net annual profits, whereas under Sched. A it is on the annual value of the property, wholly different considerations

(1) [1904] 2 K. B. 666. (2) [1891] 2 Q. B. 378.
(3) [1896] A. C. 31.

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apply from those which would be applicable to a mine in this country. The trade or business of the appellants is the extraction from the caliche which is found on the land of nitrates and iodine. If, instead of buying the land, they had bought each year so much caliche from the owners of the land and extracted therefrom the nitrates and iodine, it is clear that they would be entitled to deduct the price which they had paid for the raw material, the caliche, in order to arrive at the net profits of the business for the year on which income tax would be assessable. Under Sched. D the tax is to be "computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years"; and the rules under the Income Tax Act, 1842, s. 100, Sched. D, applicable to the first case and those applicable to the first and second cases shew that, subject to their provisions, the computation is to be on the net profits: *Lawless* v. *Sullivan*. (1) Where the business consists in manufacturing an article, the cost of the raw material from which the article is manufactured must be deducted in order to ascertain the net profits: see per Lord Halsbury L.C. in *Gresham Life Assurance Society* v. *Styles*. (2) It cannot make any difference that, instead of buying from the owners of the land year by year as much caliche as they wanted for the current year, the appellants bought a large quantity, enough to last for many years, in situ. The amount to be deducted in each year for the cost of raw material is easily ascertainable by taking such a proportion of the total price paid for the land as the amount of caliche used in the year bears to the total amount of caliche on the land. The effect of the contention for the Crown would be to tax what is not really income of the company, whereas the tax under Sched. D is, as its name imports, a tax on income: see *London County Council* v. *Attorney-General*. (3) The amount spent by the company in procuring the caliche, which is the raw material of their manufacture, is a disbursement necessarily made in order to earn their profits. In *Knowles* v.

(1) (1881) 6 App. Cas. 373. (2) [1892] A. C. 309, at p. 315.
(3) [1901] A. C. 26, at pp. 35, 45.

McAdam (1) it was held that a colliery company were entitled, for the purposes of assessment to income tax under Sched. D, to a deduction from gross profits in respect of exhaustion of capital by working the coal. That decision proceeded on the footing that the colliery proprietors were by reason of the provisions of 29 & 30 Vict. c. 36 assessable under Sched. D and not Sched. A. This view was overruled in *Coltness Iron Co.* v. *Black* (2), and it was there held in the case of a coal mine in Scotland that no such deduction could be allowed. But in that case, the mine being in the United Kingdom, the assessment had to be made, in accordance with the rules laid down in Sched. A, Income Tax Act, 1842, s. 60, upon the annual value of the property, and not on the annual profits of the business. The decision does not govern the present case, in which the property is abroad and the appellants are being assessed on the profits of their business.

[They also cited *Scoble* v. *Secretary of State for India* (3); *Reid's Brewery Co.* v. *Male* (4); *Gowan* v. *Christie.* (5)]

Sir R. B. Finlay, A.-G., and *S. A. T. Rowlatt*, for the Crown. The appellants are really seeking to deduct from their profits for the purpose of assessment to income tax a sum which they put aside out of income for the replacement of capital exhausted. It is admitted that this deduction could not be made in respect of a mine in the United Kingdom under Sched. A. There is no distinction in point of principle for the present purpose between a mine in this country and one situated abroad. The consequences of the appellants' contention logically carried out would be most extraordinary. If the appellants are right, why should there not be a deduction in respect of deterioration of the company's offices and furniture, the cost of which may be considered as disbursements necessarily made in order to earn the profits? In many cases capital is taxed in taxing income. In the case of income tax on professional income, a professional man in earning his income may be said to be using up his capital of health and

(1) (1877) 3 Ex. D. 23.
(2) (1881) 6 App. Cas. 315.
(3) [1903] 1 K. B. 494; [1903] A. C. 299.
(4) [1891] 2 Q. B. 1.
(5) (1873) L. R. 2 H. L., Sc. 273.

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strength. A company working a mine of china clay in this country would have to pay income tax computed on the full profits of the mine without any deduction for exhaustion of the clay. It would be a most anomalous result, if such a deduction were admissible, because a mine was situated abroad. Every word of the argument for the appellants would be equally applicable to depreciation by wear and tear of machinery in respect of which no deduction can be made. There is no analogy as suggested between this case and that of caliche bought year by year as raw material for the purposes of manufacture. Caliche once severed from the soil cannot be distinguished from any other goods. In this case the land must be treated as real property, and not as raw material bought for purposes of manufacture. If the appellants' contention is correct, the same principle must apply to all cases of real property, and the difficulties of its application are obvious. How is it possible to say how much caliche the ground will yield before it is exhausted? On the principle contended for by the appellants a similar deduction must be allowed in respect of every real property of this kind, whether it is possible or not to say how much of it will be exhausted in each year, or what will be left at the end of each year, or whether it is capable, practically speaking, of being exhausted at all. Such a deduction as is here sought to be made is forbidden by the first and third rules of the first case of Sched. D of the Income Tax Act, 1842, s. 100. The third rule forbids any deduction for "any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern." The sum employed in the purchase of the estate on which these deposits of caliche exist is really a sum employed as capital in the business, and the deduction claimed is in respect of exhaustion of capital. Mines fall, not under rule No. 1 of Sched. A, but under No. 3, in which the word "profits" is used. That word must bear the same meaning as it bears in Sched. D; and by s. 188 every provision which is applied to the duties in any particular schedule which is applicable to the duties in any other schedule is, unless repugnant to the provisions for ascertaining the same, to be applied thereto. It follows that, in the case of a

mine whether abroad or in this country, in estimating the balance of profits and gains no sum employed or intended to be employed as capital can be deducted. On the question of deductions from gross profits in respect of exhausted capital there was a conflict of opinion between the English Court of Exchequer in *Knowles* v. *McAdam* (1) and the Court of Session in *Addie* v. *Solicitor of Inland Revenue* (2) and *Coltness Iron Co.* v. *Black.* (3) The last-mentioned case came before the House of Lords on appeal from the Court of Session (4), and the decision of the Court of Exchequer was held to be wrong, and those of the Court of Session were upheld to the effect that no deductions could be made in respect of a sum expended in sinking pits for a coal mine. That decision is conclusive in the present case, and it did not turn, as suggested, on any distinction between the application of the two schedules to a mine, but on general principles applicable to the estimation of profits on mines. The other cases cited in the argument on behalf of the appellants do not bear on the point raised in this case and decided in favour of the Crown in the House of Lords.

Danckwerts, K.C., in reply. It has been suggested that the cases cited for the appellants are not in point; but they establish three things. First, that in taxing income under Sched. D the net profits and gains are to be arrived at from the point of view of the trader. Next, to draw attention to the fact that, under the guise of taxing income, capital must not be taxed. Lastly, to shew that what looks primâ facie like a capital charge must be examined to see if it is so in reality, and that such charges have been allowed to be deducted. There is a broad distinction between working and fixed capital by which every case can be solved.

Cur. adv. vult.

1904. Dec. 16. COLLINS M.R. read the following judgment:—The appellants are an English company who own a large tract of nitrate grounds in Chili. The upper stratum of

(1) 3 Ex. D. 23; 1 Tax Cases, 161.

(2) (1875) 2 R. 431; 1 Tax Cases, 1.

(3) (1879) 6 R. 617; 1 Tax Cases, 287.

(4) 6 App. Cas. 315; 1 Tax Cases, 311.

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these grounds consists of a substance called "caliche." This upper stratum, which contains about 30 per cent. of nitrate of soda, is loosened in the ground by explosives and is then dug up, carted away, and utilized for the production of nitrate and iodine. The appellants are assessed to income tax under Sched. D, and claim, for the purpose of computing the balance of their profits and gains, to deduct a sum representing the cost price to them of the amount of "caliche" consumed in the year's working. Assuming that this sum can be calculated, as they contend it can, the question is whether they are entitled to make the deduction. They fully admit that if the tax was levied under Sched. A they could not support the deduction, but they claim that their position is radically different under Sched. D. Channell J., affirming the view of the Commissioners, has disallowed their claim, and against his decision they now appeal. Their contention is that the sum deducted represents only the cost of the raw material consumed in the year and stored in the ground till consumed, and that there can be no distinction in principle between raw material acquired once for all and stored and the like material acquired from time to time as it is wanted for the purpose of manufacture. In my opinion, this contention is concluded by authority. The point has been frequently discussed in other cases where capital has been embarked in a wasting subject-matter, such as a coal mine, and the same argument has been advanced and overruled. I think those cases establish that on this particular point the provisions of Sched. D are no more favourable to the appellants than those of Sched. A. The words of Sched. A, No. 3, under which this case would have fallen had the property been situate in England, are these: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited." The provisions of Sched. D, first case, rule 3, are as follows: "In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from,

such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made . . . . nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern. . . ." The cases by which the contention for the appellants is concluded are *Addie* v. *Solicitor of Inland Revenue* (1), *Knowles* v. *McAdam* (2), and *Coltness Iron Co.* v. *Black* (3), the first and last decided in Scotland, and the second in England. They are all reported in volume 1 of the Tax Cases. The first and third raised the question of deductions claimed for the cost of sinking pits; the second for exhaustion of coals. In the English case it was held in the Exchequer Division that a deduction for exhaustion of coal might be made; in the Scotch cases, the first decided before, and the second after, the English case, the opposite view was taken, and the deduction for pit sinking was disallowed. The last case, *Coltness Iron Co.* v. *Black* (3), was taken to the House of Lords, where the Scotch decisions were approved and the English decision overruled. They were all treated as involving the same question. Thus barely stated, they conclude the case for the appellants, which could not have been argued but for a certain complication, which I have purposely omitted, and which, in my judgment, does not affect the decision, but upon which rested the whole of the argument for the appellants. That complication arose thus. By s. 8 of the Customs and Inland Revenue Act, 1866 (29 & 30 Vict. c. 36), it is enacted that the concerns described in No. 3 of Sched. A, under which the concerns in question fell, "shall be charged

(1) 2 R. 431. (2) 3 Ex. D. 23.

(3) 6 App. Cas. 315.

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and assessed to the duties hereby granted in the manner in the said No. 3 mentioned, according to the rules prescribed by Sched. D of the said Act, so far as such rules are consistent with the said No. 3." This enactment was treated in the Courts below in all the three cases as bringing them within Sched. D, and the Scotch cases, therefore, are express decisions on Sched. D. In reviewing the whole question the House of Lords, in affirming those decisions, though they pointed out that they were to be dealt with under Sched. A, found no fault whatever with the reasoning or the result. On the contrary, Lord Cairns says at p. 324 of the report: "My Lords, I do not think this question is affected by 29 & 30 Vict. c. 36. That Act provides that mines shall be charged and assessed according to the rules prescribed by Sched. D of the principal Act, so far as such rules are consistent with No. 3 of Sched. A. But the thing to be assessed remains the same." Lord Blackburn goes a little more into detail. He says (1): "I see that in *Addie* v. *Solicitor of Inland Revenue* (2) reliance is placed in the judgment of the Lord President on the third rule as to concerns under the first case of Sched. D, that no deduction is to be made 'for any sum employed, or intended to be employed, as capital.' But I do not think reliance can be placed on this. If from the nature of the concerns in No. 3 an allowance ought to be made for capital, then this rule should be rejected as inconsistent with No. 3. If no such allowance should be made, the rule is not required." He decided, therefore, in disallowing the deduction that this result followed from Sched. A itself, not because Sched. D would not have worked the same result as the Scotch Court had held, but because it was not required. Lord Penzance did not refer to the point at all. The result is that the authority of the Scotch cases stands unimpaired on the construction of Sched. D. But though this would be enough to decide the appeal, the matter does not rest there, since there is also English authority for the application of the same principle to cases under Sched. D. In *Gillatt* v. *Colquhoun* (3), a case under Sched. D in which a deduction was

(1) 6 App. Cas. at p. 337.
(2) 2 R. 431.
(3) (1884) 2 Tax Cases, 76, at p. 83; 33 W. R. 258, at p. 261.

claimed in respect of the depreciation in value of a leasehold interest by effluxion of time, A. L. Smith J. said: "It seems to me also that in the case of the *Coltness Iron Co.* v. *Black* (1), which, as was pointed out by Mr. Grantham, was with regard to mining under Sched. A, the learned Law Lords who decided that case undoubtedly laid down that which seems to me to be applicable to Sched. D as to Sched. A; namely, that diminishing capital or exhausted capital cannot be brought into your profits and gains when making out your accounts, either under Sched. D or Sched. A." Again, in *City of London Contract Corporation* v. *Styles* (2), another case under Sched. D, the same principle was upheld in the Court of Appeal. The deduction was there claimed in respect of a portion of the sum paid by the company in purchasing the benefit of certain unexecuted contracts which the company was formed to take over, and from executing which their profits were realized. The argument there, as here, was, "You can use your capital in purchasing contracts from which you derive your annual profits. It is capital to start with, but then you use your capital wholly and exclusively for the purposes of your concern." To which Bowen L.J. answers: "You do not use it 'for the purpose of' your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern." The deduction was disallowed. That the principles governing this question are the same under both schedules was again asserted by the Scotch Court in *Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes.* (3) See particularly the judgment of Lord M'Laren. (4) As pointed out by Channell J. the question in these cases is, not whether the deduction might be made in a theoretically perfect balance-sheet, but whether it is a deduction permitted by the Act. For the reasons I have given I regard this question as concluded by authority, and, therefore, it is unnecessary to examine it once again ab initio. The judgment of Channell J. must be affirmed.

(1) 6 App. Cas. 315.
(2) (1887) 2 Tax Cases, 239.
(3) (1889) 17 R. 154; 2 Tax Cases, 516.
(4) 17 R. at pp. 165, 166; 2 Tax Cases, at p. 531.

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STIRLING L.J. read the following judgment:—The Alianza Company is an English company incorporated under the Companies Acts, 1862 to 1890, with its registered office in London. The memorandum of association bears date June 11, 1895. The objects for which the company was established were therein stated to be (amongst others) (*a*) to acquire and take over nitrate grounds known as Alianza, in Chili, with the buildings and machinery thereon, and a site for the erection of a manufactory and for refuse ground, and also other lands adjoining the nitrate grounds and certain other lands, all being the property of Messrs. Gibbs; (*b*) to carry on the business of manufacturers and exporters of and dealers in nitrates, iodine, and other products. The company has, in accordance with these provisions of the memorandum, become the owner of the nitrate grounds, lands, buildings, and machinery mentioned in the memorandum, and has erected a factory on the site therein referred to. The nitrate grounds are of considerable extent, and contain deposits of a substance called "caliche," being the raw material from which nitrates of soda and potash and iodine can be manufactured. The company has worked these deposits and manufactured the "caliche" so obtained in the nitrates and iodine by the sale of which the company has realized very considerable profits. It is not disputed that, in accordance with decisions of the House of Lords in *San Paulo (Brazilian) Railway* v. *Carter* (1) the company is liable to be assessed in respect of such profits under Sched. D, case 1, of the Income Tax Act, 1842; but a question has arisen whether, in making such assessment, there ought to be deducted from the admitted receipts of the company any sum in respect of the cost price of the "caliche" worked up by the company in the course of each year. The company claims to be entitled so to do on the ground that such cost is an expense "wholly and exclusively laid out or expended for the purposes of such trade" within the meaning of the first rule applicable to the first and second cases under Sched. D. Primâ facie the claim appears to be reasonable, for such an expense ought certainly to be deducted by a prudent trader from his gross receipts

(1) [1896] A. C. 31.

before he arrives at the amount of his profits for any particular period. But the answer on behalf of the Crown is that, however this may be, the deduction in question is forbidden by the terms of the Income Tax Act itself, and reference is made to the third rule applicable to the first case under Sched. D. That rule reads: "In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern. . . ." With this there ought to be borne in mind s. 159, which provides that "in the computation of duty to be made under this Act in any of the cases before mentioned . . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments, nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed or loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation."

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It is clear from these enactments (as has been repeatedly pointed out) that the law does not permit, as regards such assessments, all deductions which a prudent trader would make in ascertaining his own profits. In the present case the particular words relied on are those which prohibit deductions "on account of any sum employed or intended to be employed as capital in such trade." This prohibition was given effect to by this Court, affirming the decision of a Divisional Court in *City of London Contract Corporation* v. *Styles*. (1) In that case the company had purchased for the sum of 180,000*l*. the business as a going concern of Charles Phillips & Co., contractors for public works and engineers, with their contracts, plant, and materials. From their receipts in carrying on the business they claimed to deduct a sum of 80,000*l*., which (as they stated) "substantially represented a portion of the purchase-money paid to Charles Phillips & Co. for the purchase of the contracts and business on which the said net profits were realized. . . . The said business consisted entirely of partially executed or wholly unexecuted contracts and of the rights thereunder and the benefits to accrue therefrom." (2) The argument was that this 80,000*l*. was money "wholly and exclusively laid out or expended" for the purposes of the business. The Court decided against the claim of the company, Fry L.J. saying: "It appears to me that this 80,000*l*. was a sum 'employed or intended to be employed' as capital in the trade of the company; therefore it is a sum from which no deduction can be made under the Income Tax Acts." (3) Now in the present case the cost price of the "caliche" deposited in the nitrate grounds formed part of the price paid by the Alianza Company for the acquisition by them from Messrs. Gibbs of those nitrate grounds and other property. The argument urged before this Court on behalf of the appellants was precisely that used in the case of *City of London Contract Corporation* v. *Styles* (1); and, in my opinion, effect cannot be given to that argument without departing from the decision in that case, which is binding on this Court. That decision, how-

(1) 2 Tax Cases, 239. (2) 2 Tax Cases, at p. 241.
(3) 2 Tax Cases, at p. 245.

ever, does not stand alone. The same view was taken by the Court of Session in Scotland in a series of cases—namely, *Addie* v. *Solicitor of Inland Revenue* (1); *Coltness Iron Co.* v. *Black* (2), which was affirmed in the House of Lords (3); *Inland Revenue* v. *Farie*. (4) It is true that in all these cases the assessment was made under Sched. A, to which the rules under Sched. D were made applicable by 29 & 30 Vict. c. 36, s. 8, only "so far as such rules are consistent with" Sched. A. It is also true that Lord Blackburn, in advising the House of Lords in *Coltness Iron Co.* v. *Black* (5), held that recourse ought not to have been had in *Addie's Case* (1) to the third rule under the first case in Sched. D; but neither he nor any of the other noble Lords who took part in the decision cast any doubt on the construction placed on that rule by the judges in Scotland. The only authority in the appellants' favour is *Knowles* v. *McAdam* (6); but this case was overruled by the House of Lords in *Coltness Iron Co.* v. *Black* (5), no doubt on the ground that an erroneous construction had been placed by the Exchequer Division on the statute 29 & 30 Vict. c. 36, s. 8, already referred to: but at the same time I am unable to see that anything was said which lends support to the argument on behalf of the present appellants. It was said that the Alianza Company is entitled to apply capital in payment of dividends, and the case of *Lee* v. *Neuchatel Asphalte Co.* (7) was referred to. I do not think it necessary to discuss the vexed question whether capital can be lawfully applied in payment of dividends, and, if so, in what circumstances. It is sufficient to say that I am not satisfied that such capital (if any) as may be lawfully paid away by a company to its shareholders in the shape of dividends would be regarded by the Legislature as an unfit subject for assessment to income tax, or would not fall within the prohibited deductions in respect of "capital withdrawn" or sums "employed or intended to be employed as capital." For these reasons I think that the appeal fails and ought to be dismissed.

(1) 2 R. 431; 1 Tax Cases, 1.
(2) 6 R. 617; 1 Tax Cases, 287.
(3) 6 App. Cas. 315; 1 Tax Cases, 311.
(4) (1878) 16 Sc. L. R. 189.
(5) 6 App. Cas. 315.
(6) 3 Ex. D. 23.
(7) (1887) 41 Ch. D. 1.

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MATHEW L.J. I am of the same opinion. The objections raised on behalf of the appellants to the assessment have been successfully disposed of in the judgment of my brother Channell, and I cannot usefully add anything to the reasons given by my Lord and my brother Stirling for dismissing the appeal.

Appeal dismissed.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

A. M.

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CHEPSTOW ELECTRIC LIGHT AND POWER COMPANY, LIMITED, APPELLANTS; CHEPSTOW GAS AND COKE CONSUMERS' COMPANY, LIMITED, RESPONDENTS.

Justices—Complaint—Limitation of Time—Laying Electric Lines near Gas Mains—Arbitration—Award of Compensation—Conviction—Penalties—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Electric Lighting (Clauses) Act*, 1899 (62 & 63 *Vict. c.* 19), *Schedule*, *s.* 18.

By the Electric Lighting (Clauses) Act, 1899, schedule, s. 18, undertakers who lay new electric lines (other than service lines) near the mains of any gas company shall conform with the reasonable requirements of the gas company for protecting their mains from injury, and for securing access thereto, and repair any damage done thereto, any question or difference which may arise under that section to be determined by arbitration; and if the undertakers make default in complying with any of the requirements of the section, they shall make full compensation to the gas company for loss or damage incurred by reason thereof, "and in addition thereto they shall be liable for each default to a penalty not exceeding 10*l.*, and to a daily penalty not exceeding 5*l.*" By s. 1, "the expression 'daily penalty' means a penalty for each day on which any offence is continued after conviction therefor."

In October, 1903, an electric light company were laying in the streets of a town new electric lines (other than service lines) near the mains of a gas company. On October 2, 1903, the gas company by letter to the electric light company complained that the lines were being laid in a manner which was injurious to the gas mains, and required the lines to be relaid in a proper manner. Correspondence then ensued between the two companies, in the course of which the gas company, by letters of October 27 and November 2, 1903, respectively, specified their requirements with

respect to the laying of the electric lines. Throughout the correspondence the electric light company, who completed the work of laying their lines on or before October 31, 1903, disputed the reasonableness of the gas company's requirements, and they did not at any time comply with them.

The questions and differences which had arisen between the two companies were, shortly after November 2, 1903, referred to arbitration under s. 18 of the schedule to the Act of 1899, and on February 12, 1904, the arbitrator made his award, finding in effect that the electric light company had not conformed with the requirements of the gas company, and awarding to the latter a sum as full compensation for the loss and injury they had thereby sustained. On April 29, 1904, the gas company's solicitors wrote to the electric light company's solicitors pointing out that the electric light company had made no attempt to comply with the gas company's requirements, and threatening proceedings for penalties under s. 18 unless an undertaking were given that those requirements would be fully complied with. On May 31, 1904, a complaint was made on behalf of the gas company alleging that "on and since October 2, 1903," the electric light company had made default in complying with certain requirements of s. 18; that they had laid their new electric lines too near the gas company's mains, and did not conform and had not conformed with the gas company's requirements for protecting from injury their mains, and for securing access thereto. On the hearing of the complaint before justices they convicted the electric light company of the offence alleged in it, and adjudged that they should "forfeit and pay to the clerk of the Court the sum of 1*l.*, and the further sum of 1*l.* for every day during default":—

Held, that the complaint and conviction sufficiently alleged an offence completed within six months before the time when the complaint was made, and were, therefore, not bad on the face of them under s. 11 of the Summary Jurisdiction Act, 1848; nor did the facts proved before the justices and above stated shew a completed offence before the statutory period of limitation began to run.

[*Semble*, that, whether the complaint was or was not made within the statutory period, the offence was a continuing offence, so that s. 11 did not apply.]

Held, also, that the reference to arbitration and the award did not bar the right of the electric company to proceed for penalties under s. 18 of the schedule to the Electric Lighting (Clauses) Act, 1899:

Held, further, that the conviction so far as it imposed the additional daily penalties was bad, but that it could be dealt with either by an amendment striking out the part which related to those daily penalties, or by directing that no effect be given to that part in the event of an attempt being made to enforce them, and that the other part of the conviction was good, and could be enforced.

CASE stated under the Summary Jurisdiction Acts by two justices of the peace of the county of Monmouth.

The appellants, an electric light company, were summoned

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before the justices to answer a complaint made on behalf of the respondents, a gas company. The complaint alleged that the electric light company "on and since the second day of October, 1903, at the parish of Chepstow . . . . did make and have made default in complying with certain requirements of s. 18, sub-s. 1, of the Electric Lighting (Clauses) Act, 1899 (1), in that the said electric light company have laid down and constructed new electric lines and other works in certain portions of the following streets, viz." [the various streets were here described] "in undue proximity to the mains or pipes belonging to the said gas company, and did not conform and have not conformed with such requirements as were made by or on behalf of the said gas company for protecting from injury their said main pipes and other works and, for securing access thereto,

(1) 62 & 63 Vict. c. 19, s. 1, enacts that "the provisions contained in the schedule to this Act shall be incorporated with and form part of every provisional order made by the Board of Trade after the commencement of this Act under the Electric Lighting Acts, save so far as they are expressly varied or excepted by the order, and shall, subject to any such variations or exceptions, apply, so far as applicable, to the undertaking authorized by the order."

Schedule, s. 18: "(1.) Where the undertakers require to dig or sink any trench for laying down or constructing any new electric lines (other than service lines) or other works near to which any . . . . main, pipe . . . . or other work belonging to any gas . . . . company has been lawfully placed. . . . the undertakers . . . . in this section referred to as the 'operators' shall, unless it is otherwise agreed between the parties interested, or in case of sudden emergency, give to the . . . . gas . . . . company . . . . in this section referred to (amongst other bodies and companies) as the 'owners,' not less than three days' notice before commencing to dig or sink such trench as aforesaid, and those owners shall be entitled by their officer to superintend the work, and the operators shall conform with such reasonable requirements as may be made by the owners or the officer for protecting from injury every such . . . . main, pipe, ... or work, and for securing access thereto, and they shall also, if required by the owners thereof, repair any damage that may be done thereto."

"(4.) Any question or difference which may arise under this section shall be determined by arbitration.

"(5.) If the operators make default in complying with any of the requirements of this section they shall make full compensation to all owners affected thereby for any loss, damage, penalty, or costs which they may incur by reason thereof; and in addition thereto they shall be liable for each default to a penalty not exceeding ten pounds, and to a daily penalty not exceeding five pounds. . . ."

By s. 1 of the schedule, "the expression 'daily penalty' means a penalty for each day on which any offence is continued after conviction therefor."

contrary to the form of the statute in such case made and provided."

At the hearing before the justices the following material facts were proved or admitted :—

The gas company were incorporated by Act of Parliament in the year 1856, and under their statutory powers had, some years before the matter of the complaint arose, laid down gas mains in the streets in question.

The electric light company were incorporated in 1902, and in the same year obtained a provisional order, subsequently confirmed by Act of Parliament, from the Board of Trade under the Electric Lighting Acts, 1882 and 1888, which provisional order incorporated the provisions contained in the schedule to the Electric Lighting (Clauses) Act, 1899.

In the latter part of the year 1903 the electric light company began to lay new lines (other than service lines) for the purposes of their undertaking in the streets of the town of Chepstow, including the streets named in the complaint.

On October 2, 1903, the gas company, by letter of that date written by their manager to the electric light company, complained that the latter were laying their electric lines in some parts of the town in a manner which was injurious to the gas company's mains, and prevented the gas company having free access thereto. After giving some particulars of the matters complained of, the letter proceeded : "I am therefore instructed to give you notice that this company require you to relay your lines in a proper manner, and to give them the statutory three days' notice of the work, so that they may have the opportunity afforded to them of sending an officer to superintend the work and to point out to you the requirements of this company. In default of your complying with this request this company hereby give you notice that they will not be responsible for any damage which may be caused to your lines when this company require to have access to their mains, and they reserve the right to take such proceedings against your company as they may be advised." Correspondence then ensued between the parties, and on October 27, 1903, the gas company gave

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the following notice to the electric light company: "We hereby give you notice that we object to the manner in which you have laid your mains and lines in the streets and roads where the same are laid near our mains, on the ground that they have not been laid in accordance with the provisions of the Electric Lighting (Clauses) Act, 1899, and more especially on the ground that in several places you have laid your mains and lines so close to the mains belonging to this company, and in many instances crossing the mains of this company, that free access to such mains is wholly prevented. We hereby give you further notice that we require you to lay your mains and lines at a distance of at least one foot from the mains of this company, and in such a manner that this company can have free access to their mains."

The whole of the work of laying the electric lines in the streets mentioned in the complaint was completed by October 31, 1903.

On November 2, 1903, the manager of the gas company wrote to the electric light company: "With reference to the several requirements which we have from time to time made to you in writing by letter and by notices and also verbally by our manager to you and your contractors during the course of the laying down of your electric mains and lines, for the protection of our gas mains and pipes and for securing access thereto, which requirements you have failed to comply with, we write you for the purpose of presenting to you in the most formal way the matters which we require you to give your immediate attention to." The letter then set forth various specific requirements made by the gas company for the purpose of protecting their mains from injury and of securing access thereto, and continued: "Although we have from time to time pointed out the above requirements to you none of them have so far been fulfilled. We also give you notice that we require you to give us proper notices of all future operations, so that we can effectually control them. Kindly let us hear that all these requirements will be at once complied with. We desire to add that at the proper time we shall claim from you the penalties we contend are due to us for your breaches

of your Acts as well as such damages as we may prove we have sustained, or may hereafter sustain, by your operations." Throughout the whole of the correspondence the electric light company disputed the reasonableness of the gas company's requirements.

On November 14, 1903, the gas company applied to the Board of Trade to appoint an arbitrator "to investigate and determine the questions and differences which have arisen between this company and the Chepstow Electric Light and Power Company, Limited," and the Board of Trade accordingly appointed an arbitrator, who held the arbitration on February 1 and 2, 1904.

On February 12, 1904, the arbitrator made his award, by which he found and awarded as follows:—

He found that the electric light company did not comply with the conditions of s. 18 of the schedule to the Electric Lighting (Clauses) Act, 1899, in respect of giving to the gas company not less than three days' notice before commencing to dig or sink their trenches for laying down or constructing their new electric lines and other works near to the mains belonging to the gas company in respect of the lines and works laid down and constructed in certain streets (being the same streets as were described in the complaint) between September 7 and November 13, 1903, "and did not conform with such requirements as were made by or on behalf of the gas company for protecting from injury their said mains and for securing access thereto":

That the said electric lines and works had been laid down and constructed in certain portions of the before-mentioned streets in undue proximity to the mains or pipes belonging to the gas company, and such mains and pipes were in fact more liable to damage, and the gas company's access thereto was rendered more difficult and inconvenient by reason of such undue proximity:

He awarded that the electric light company should pay to the gas company 36*l.* 6*s.* 6*d.* as full compensation for the loss and damage suffered by the gas company in respect of the matters aforesaid, and that the electric light company should

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pay to the gas company the expenses of the award, which he assessed.

On April 29, 1904, the solicitors of the gas company wrote to the solicitors of the electric light company formally applying for payment of the sums awarded by the arbitrator, and stating that their clients were surprised that the electric light company had not made any attempt to comply with the requirements of the gas company, and that unless an undertaking were given that those requirements would be fully and satisfactorily complied with at an early date, the gas company would have no alternative but to make an application for penalties under s. 18 of the schedule to the Act of 1899.

The complaint was laid on May 31, 1904, and bore that date.

At the hearing of the complaint the facts found by the arbitrator were proved to the satisfaction of the justices, and they convicted the electric light company of the offence charged in the complaint, and fined them 1*l.* and costs, and a daily penalty during default of 1*l.*

The conviction was as follows: "The Chepstow Electric Light and Power Company, Limited, hereinafter called the defendants, are this day convicted before this Court for that the said company on and since the second day of October, 1903, at Chepstow in the said county, did make and have made default in complying with certain requirements of s. 18, sub-s. 1, of the Electric Lighting (Clauses) Act, 1899, in that the said defendants have laid down and constructed new electric lines and other works in certain portions of the following streets, namely" [names of the streets stated], "in undue proximity to the mains or pipes belonging to the Chepstow Gas and Coke Consumers' Company, Limited, and did not conform and have not conformed with such requirements as were made by or on behalf of the said gas company for protecting from injury their said mains, pipes, and other works and for securing access thereto, contrary to the form of the statute in such case made and provided: And it is adjudged that the defendants do for their said offence forfeit and pay to the clerk of this Court the sum of one pound and the further sum of one pound for every day during default and the sum of

eleven shillings for costs: And it is ordered that the said sums be paid forthwith: And if default is made in payment according to the adjudication and order, it is ordered that the sums due thereunder be levied by distress and sale of the defendants' goods."

The question for the opinion of the Court was whether the justices' decision was right in point of law.

Shiress Will, K.C., for the appellants. First, the conviction is bad on the face of it because, assuming there was power to convict at all, it inflicts future daily penalties before conviction for the offences in respect of which those penalties are inflicted. A conviction is good or bad as a whole; it cannot be taken to pieces and part held good and part bad: *Reg.* v. *Slade* (1), judgment of Wills J.

Secondly, the conviction is bad under s. 11 of the Summary Jurisdiction Act, 1848 (2), because the offence was completed more than six months before the summons was issued. The conviction is bad on the face of it because it is for an offence committed "on and since October 2, 1903." The facts stated in the case shew that the acts complained of by the respondents were completed by the end of October, and it is not a continuing offence: *Marshall* v. *Smith* (3); *Reay* v. *Gateshead Corporation* (4); *London County Council* v. *Cross* (5); *Reg.* v. *Struve* (6); *Welsh & Son* v. *West Ham Corporation* (7); *Hull* v. *London County Council.* (8) The last-mentioned case is a strong authority in the appellants' favour.

Thirdly, the offence was purged by the arbitrator's award, which is in terms an answer to the conviction, for it awards the respondents full compensation for the loss and damage

(1) [1895] 2 Q. B. 247, at p. 248.

(2) 11 & 12 Vict. c. 43, s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

(3) (1873) L. R. 8 C. P. 416.

(4) (1886) 55 L. T. 92.

(5) (1892) 66 L. T. 73.

(6) (1895) 59 J. P. 584.

(7) [1900] 1 Q. B. 324.

(8) [1901] 1 K. B. 580.

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suffered by them in respect of the matters dealt with by the conviction. The whole matter was referred to the arbitrator, and the compensation must be taken to have included any possible penalties.

Macmorran, K.C. (*S. G. Lushington* with him), for the respondents. As to the first point, it must be admitted that so much of the conviction as inflicts future daily penalties is bad and cannot be enforced; but that part can be separated from the rest of the conviction, as in *Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (1), where it was held that an order for the abatement of a nuisance and for a prohibition was bad so far as it ordered the abatement, but good so far as it granted a prohibition.

As to the second point, the offence specified in s. 18 of the schedule to the Electric Lighting (Clauses) Act, 1899, is "default in complying with any of the requirements of this section," and one of the requirements of the section is that the operators "shall conform with such reasonable requirements as may be made by the owners." Here the respondents, who were the "owners," complained that the appellants' electric lines were being laid too near the respondents' gas mains, and the conviction is for not complying with the respondents' reasonable requirements in that respect. There was no completed offence until it had been decided by the arbitrator's award that the lines were in fact laid too near the gas mains, and that the respondents' requirements were reasonable. At any rate the time limited by s. 11 of the Summary Jurisdiction Act, 1848, did not begin to run until the respondents' requirements were formally made by the letter of November 2, 1903. Further, the offence is necessarily a continuing offence; it continues so long as the failure to comply continues; it is in the nature of a continued disobedience of an order, and s. 11 therefore does not apply to it: see *Mayer* v. *Harding*. (2) In all the cases cited for the appellants, in which the offence was held to be not continuing, the act complained of was completed, as where a projection was permanently placed over the pavement, or a house was built beyond the building line; but

(1) (1876) 1 Ex. D. 344. (2) (1867) 17 L. T. 140.

here the offence is continuing as it was held to be in *Higgins* v. *Guardians of the Poor of Norwich Union* (1), where the conviction was for a nuisance caused by black smoke, and in *Metropolitan Board of Works* v. *Anthony & Co.* (2), where the offence was the maintenance of a temporary structure. The date of the offence is sufficiently stated in the conviction by the words "on and since the 2nd of October, 1903," if an offence be proved to have been committed since October 2 and within the six months. The offence clearly cannot be completed when the requirements are made, because a reasonable time must be allowed for the operators to conform with the requirements.

As to the third point, s. 18, sub-s. 5, expressly provides that the operators shall be liable to penalties "in addition to" making full compensation. The proceedings before the arbitrator and the proceedings for penalties before the justices have no necessary connection. The award, therefore, did not bar the respondents from proceeding for penalties. The respondents' letter of April 29, 1904, gave the appellants clear notice of the offence which was the real subject-matter of the complaint and summons. [He also referred to *Shelfer* v. *City of London Electric Lighting Co.* (3)]

Shiress Will, K.C., replied.

LORD ALVERSTONE C.J. I am of opinion that we ought not to interfere with this conviction. The proceedings were commenced by complaint and summons under s. 18 of the schedule to the Electric Lighting (Clauses) Act, 1899, against the electric light company for having laid down electric lines in undue proximity to the gas company's mains, and for not conforming with requirements made on behalf of the gas company. The statement that the lines were laid down in undue proximity to the mains appears to have been inserted in the complaint because there had been proceedings before an arbitrator to determine what damage had been done to the mains, and he had found that the lines were laid down in undue

(1) (1870) 22 L. T. 752. (2) (1884) 54 L. J. (M.C.) 39.
(3) [1895] 1 Ch. 287.

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proximity to the mains, and he went on to find that the electric company had not obeyed the reasonable requirements of the gas company. Sect. 18 does not contemplate as an offence the laying down of the lines in any given position, but it provides machinery whereby gas companies and others, whose interests are affected by the laying down of lines, may make reasonable requirements for their own protection on notice being given to them that the lines are about to be laid. Sub-s. 5 of s. 18, however, makes a default in complying with any of the requirements of that section a substantive offence, and for the purposes of this case the only requirement of the section is that the reasonable requirements made on behalf of the gas company for the protection of their gas pipes should be complied with. The main question we have to consider is whether or not the time limit of six months contained in s. 11 of the Summary Jurisdiction Act, 1848, applies so as to make the conviction bad on the face of it, or bad on the facts stated by the magistrates, by shewing that the offence charged was completed more than six months before the proceedings were taken. It was also contended by counsel for the appellants that no proceedings for a penalty could be taken because the matter had been referred to an arbitrator who had awarded compensation to the gas company. We are all clearly of opinion that the latter point is not good. Not only does sub-s. 5 say that the penalty shall be in addition to making full compensation, but it is obvious that the penalty has no necessary relation to the compensation, because the penalty may be imposed for the purpose of enforcing obedience to some requirement which does not involve compensation at all and yet may be found to be a reasonable requirement—as, for instance, putting the lines at such a distance from the gas pipes as may be thought to be necessary for safety. That is further made clear by the provision adding a daily penalty, which shews that the provisions with respect to penalties have nothing to do with the compensation to be paid to the gas company. It was further contended that the conviction was bad because, in addition to imposing the penalty of 1*l.*, it went on to say, "and the further sum of 1*l.* for every day during default." Upon

this point the respondents' counsel admitted that a conviction for an offence under the section could not impose additional daily penalties for future offences, and that must be so, especially when it is remembered that the Act provides that the expression "daily penalty" means "a penalty for each day on which any offence is continued after conviction therefor." If, therefore, the validity of the conviction had turned upon the addition of these daily penalties, we should have to consider what was said by Wills J. in *Reg.* v. *Slade.* (1) But we all think that this is not a matter which affects the validity of the conviction, and the result of our order would be either that the conviction be amended by striking out the part which relates to the daily penalties, or that no effect be given to that part in the event of an attempt being made to enforce the daily penalties. Then comes the more difficult point, whether the complaint was, or was not, made too late. None of the cases cited in argument, of which *Hull* v. *London County Council* (2) was most relied on, have, in my view, any direct application. Sect. 11 of the Summary Jurisdiction Act, 1848, provides that, where no time is specially limited for making a complaint or information, it shall be made "within six calendar months from the time when the matter of such complaint or information respectively arose." Now, all the cases cited were cases in which there had been a complaint or information for doing an act which was complete in itself either having regard to the words of the statute creating the offence, or complete in fact, as where a house was built beyond the building line, or a structure was erected over the pavement, as in *Hull* v. *London County Council.* (2) The question before us is, Are the appellants right in their contention that the proceeding was too late either because the complaint and conviction relate to something which occurred as far back as October 2, 1903, or because it is alleged on the face of the complaint and of the conviction that the appellants committed the offence "on and since October 2, 1903"? I have come clearly to the opinion that, whatever may be the rights of the magistrates in certain cases, this is certainly not an objection which makes the conviction bad

(1) [1895] 2 Q. B. 247, at p. 248. (2) [1901] 1 K. B. 580.

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on the face of it. It is obvious that, where you are dealing with disobedience to, or default in conforming with, requirements which contemplate the execution of works which must necessarily take some time to execute, it is impossible to say that the statutory time of limitation begins to run from the date of the requirement itself. Cases may be imagined in which it might take a very considerable time. But a broader view may, I think, be taken of this case—namely, that not conforming with one of these requirements, if it be a reasonable requirement, is put by the statute in the same position as disobedience to an order, and I doubt whether the time of limitation can be said to begin to run where persons are continuing to disobey an order which is always operative until it is obeyed. I can imagine a case, though I am not deciding it now, in which a compliance with the requirement made, or the doing of the thing ordered to be done, might require so little time that the magistrates might well think there was a completed offence at some time more than six months before the complaint or information was laid; it is possible that they might treat the disobedience of the order as being of such a character that the offence was completed at that time. But, having regard to the order here and to the facts found by the magistrates, that exception, if it be an exception, which I do not decide, could not arise or be relied on. There having been correspondence, and definite requests by the respondents to do certain work, the parties went to arbitration, and the award was not made until February 12, 1904. The appellants, therefore, were disputing that their electric lines were too near the gas company's mains and pipes for more than four months after the question was raised, and after the date of the award there was a further request to them to do what the gas company wanted.

I am, therefore, clearly of opinion that it is not possible for us to construe this conviction for an offence, in respect of which a penalty has been inflicted, as completed on the 2nd of October. Whether we take the form of the complaint and construe it fairly, or whether we look at the facts stated by the magistrates, there is nothing to shew that the offence of not

conforming to the requirement was complete more than six months before the complaint was made.

I am of opinion that all the points raised for the appellants fail, and that our judgment must be for the respondents.

KENNEDY J. I agree. I have nothing to add.

RIDLEY J. I agree also. It appears to me that the present case differs entirely from *Hull* v. *London County Council*. (1) There the information charged that Hull had extended a projection beyond the general line of building. Here the default alleged is a failure to comply with requisitions which are found to be reasonable. In *Hull's Case* (1) the offence was complete when the projection was extended. In this case it seems to me impossible to say that it is complete at any particular moment, for it continues to exist from day to day. I think that is a very strong distinction.

Judgment for the respondents. Conviction in part affirmed.

Solicitors for appellants: *Ley, Lake & Ley, for Morgan & Co., Newport, Monmouthshire.*

Solicitors for respondents: *Stow, Preston & Lyttleton, for Colborne, Coulman & Lawrence, Newport, Monmouthshire.*

(1) [1901] 1 K. B. 580.

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THE KING *v.* KETTLE AND THE LONDON COUNTY COUNCIL. *Ex parte* ELLIS.

Summary Jurisdiction—Practice—Recognizances on Case stated—Sufficiency—Summary Jurisdiction Act, 1857 (20 & 21 *Vict.* c. 43), *ss.* 3, 5.

The appellant having been convicted at a metropolitan police court of an offence against the London Building Act, 1894, applied to the magistrate to state a case, and his application was refused. The appellant then entered into a recognizance with one surety with the consent of the magistrate, under 20 & 21 Vict. c. 43, s. 3, to prosecute the appeal, and applied to and obtained from the High Court a rule absolute for a mandamus to the magistrate to state the case. In the meantime the appellant had been adjudicated bankrupt and his surety had died. The magistrate stated and signed the case in pursuance of the order of the Court, but declined to deliver it up until the appellant had entered into a fresh recognizance:—

Held, that the recognizance previously entered into was valid, and that the magistrate had no authority to require a fresh recognizance.

RULE NISI calling upon Rupert E. C. Kettle, Esq., the metropolitan police magistrate at Woolwich, and the London County Council, to shew cause why the magistrate should not deliver to the applicant Ellis a certain case stated and signed by the magistrate, in which Ellis was the appellant and the London County Council were the respondents.

It appeared that in August, 1903, Ellis was summoned by the London County Council, under the London Building Act, 1894, for erecting a building at Charlton, in the county of London, beyond the general building line, and was convicted and fined by Mr. Kettle at the Woolwich Police Court, and ordered to demolish a portion of the building. Ellis applied to the magistrate to state a case for the opinion of the High Court, but this application was refused. Two or three days later, on August 17, 1903, Ellis attended before the magistrate and stated that he desired to enter into such recognizances, under s. 3 of 20 & 21 Vict. c. 43, as Mr. Kettle should require for the prosecution of a case to be stated. Mr. Kettle said that

he might enter into the recognizance for what it was worth, and that he should require a recognizance by himself and one surety in the sum of 50*l.* Ellis then accordingly entered into a recognizance in due form for this amount, and on August 22 one Josiah Leaver at his request entered into a recognizance as surety for him for the same amount. The recognizances were annexed to the security book kept at the Woolwich Police Court.

On August 20, 1903, Ellis obtained from the judge in chambers a rule nisi for a mandamus calling upon Mr. Kettle to shew cause why he should not state a case. This rule was after argument made absolute on December 17, 1903.

Meantime the surety, Leaver, died on September 10, 1903, and Ellis was adjudicated bankrupt on October 13, 1903.

Mr. Kettle having stated and signed a case pursuant to the order of December 17, 1903, refused to deliver it to Ellis unless he first entered into a fresh recognizance with sureties under s. 5 of 20 & 21 Vict. c. 43.

Ellis then obtained this rule nisi. Mr. Kettle did not appear, but in an affidavit filed by him he stated that, having regard to s. 5 of 20 & 21 Vict. c. 43, it appeared to him that, before delivering the case which he had stated and signed pursuant to the order of December 17, 1903, he must require a recognizance to be entered into upon that case and sufficient at the time of its delivery, and that he had great doubt whether the previous recognizance could be construed as applying to the costs of the case stated by order of the Court, and also whether Leaver's estate could be made liable upon a recognizance which did not come into operation (if at all) until after his decease and whether this kind of recognizance could be enforced against the estate of a deceased surety. He further stated that he had offered to deliver the case to Ellis's solicitors upon a fresh recognizance in the sum of 50*l.* being entered into, and that as Ellis had been adjudicated bankrupt he considered that the fresh recognizance ought to be entered into by two sureties in addition to Ellis. (1)

(1) By 20 & 21 Vict. c. 43, s. 2, "After the hearing and determination by a justice or justices . . . . of any information or complaint . . . . either

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Daldy, for the London County Council, shewed cause. The recognizance entered into by Ellis and Leaver came under s. 3 and not under s. 5, and related to the case which the magistrate refused to state. The words of s. 5 clearly indicate that a recognizance should be entered into in regard to the case which the magistrate has stated and signed in pursuance to the order of the Court. The magistrate can only consider the sufficiency of the recognizance when he has received the order to state the case. The words "as is hereinbefore provided" merely refer to the recognizance being such as the magistrate may approve. A further point is that the recognizance entered into in August, 1903, had failed by the death of the surety and the bankruptcy of the principal before the magistrate was ordered to state a case. A recognizance of this character could not be enforced against the estate of the deceased surety. The recognizances referred to in s. 3 and s. 5 are given on quite separate occasions. That given under s. 3 is conditioned to prosecute the appeal, to submit to the judgment of the Court, and to pay costs, and is to be entered into before the case is stated. That referred to by s. 5 is to be entered into after the case has been stated and signed in obedience to the order of the Court.

Frank Gover, in support of the rule. The recognizance entered into with the assent of the magistrate in August, 1903, is sufficient. It was conditioned to prosecute the case to be

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party . . . . may . . . . apply . . . . to the said justice or justices to state and sign a case . . . . for the opinion thereon of one of the superior Courts of law. . . ."

By s. 3, "The appellant at the time of making such application, and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognizance . . . . with or without surety or sureties, and in such sum as to the justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior Court, and pay such costs as may be awarded by the same. . . ."

By s. 5, "Where the justice or justices shall refuse to state a case . . . . it shall be lawful for the appellant to apply to the Court of Queen's Bench upon an affidavit of the facts for a rule calling upon such justice or justices, and also upon the respondent, to shew cause why such case should not be stated . . . . and the justice or justices, upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as is hereinbefore provided."

stated. Mr. Kettle had already refused to state a case, and the recognizance could therefore only apply to the case which the Court might order him to state. It is admitted that the recognizance was then sufficient and satisfactory to the magistrate, and if he had consented to state the case there would not have been the difficulty caused by the death of the surety and the bankruptcy of the principal. The delay was the fault of the magistrate in refusing to state the case.

[He was stopped.]

LORD ALVERSTONE C.J. This case is certainly one of difficulty and importance. It must be taken, I think, in favour of the applicant that security has been given by him in accordance with s. 3 of 20 & 21 Vict. c. 43. It is of course most material that security should be given, and if it could have been said either that no security was given under s. 3, or that the magistrate had no power to take security at that stage of the proceedings because he had not then made up his mind whether he would grant a case or not, or because he was going to refuse it, that would have gone a long way to convince us that the rule should be discharged. It seems to me, however, impossible to say that it was not within the power of the magistrate to take the recognizance of the applicant at the time that he did take it. Sect. 3 says the appellant at the time of making such application, and before the case shall be stated and delivered to him by the justice, shall in every instance enter into a recognizance. An extended construction has been put upon that section by the cases of *Chapman* v. *Robinson* (1) and *Stanhope* v. *Thorsby*. (2) In *Chapman's Case* (1) it was decided that the appellant may enter into the required recognizance at any time during the three days allowed for applying for a case. The second case, that of *Stanhope* v. *Thorsby* (2), goes further, and says it is enough, if the recognizance is entered into before the case is stated, if the application to state the case has been made within the three days. But neither of those cases throws any doubt on the right and the jurisdiction of the magistrate to take the recognizance at the time of

(1) (1858) 1 E. & E. 25. (2) (1866) L. R. 1 C. P. 423.

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making the application. Therefore, as I have said, I think we must take it that the application to the magistrate to take the recognizance in August, 1903, was made at a time when it was within his jurisdiction to take it.

The only other point is whether the fact that the magistrate refused to state a case and that this Court has since ordered the case to be stated makes any difference and makes it necessary for the applicant to enter into further recognizances. I admit that s. 5 affords some ground for Mr. Daldy's argument, because it says: "The justice or justices, upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as is hereinbefore provided." That was obviously necessary in order to prevent a person obtaining the case on the rule without giving any security; but it seems to me that the phrase "as is hereinbefore provided" may be well satisfied, not only by the form and nature of the recognizance, but also by saying it is a recognizance which is to be taken in the way contemplated by s. 3; and, on that construction, it would rather help Mr. Gover's argument, because he says that s. 5 is to be effective if the appellant has fulfilled the conditions required by s. 3.

Therefore it seems to me that there was a recognizance given in August, 1903, in accordance with s. 3, and that that security is effective for whatever it may be worth against the persons who became either principal or surety, and that the condition of the recognizance is the same as it would be if a fresh recognizance were entered into, namely, to prosecute the appeal, and pay the costs that may be awarded by the Court on a case being stated. In those circumstances it seems to me impossible for us to say that the magistrate was right in refusing to deliver out the case to the applicant without a further security being given by him. I think, therefore, that this rule should be made absolute.

KENNEDY J. I am of the same opinion. It seems to me that under s. 3 (although it has been decided that it is sufficient if the recognizances are entered into before the case is stated and delivered out) it is perfectly correct for the intending appellant

to offer, and there is nothing to prevent the magistrate allowing him, to enter into recognizances at the time of the application for a case. The application may or may not be granted at the time it is made; indeed, the application itself may be made in writing within three days after the hearing by the justice or justices, and the applicant may not know whether the case will be granted or not; but he has, let us suppose, persons present at the time of his application who are willing to enter into recognizances conjointly with him, so that it is convenient that the recognizances should be entered into then. The form of recognizance refers to a case that is to be stated. Assume here that the magistrate after considering the application declined to state a case, but the case is afterwards stated by direction of this Court. Is not the recognizance taken at the time of the application a subsisting recognizance, although the magistrate declined in the first instance to state the case, and this Court has had to be invoked to direct him to state the case in respect of which the recognizance has been offered and taken? When we come to look at s. 5, I see nothing in that section which justifies a different view. The Court has power under s. 5 to decide that the case must be stated. We make the rule absolute for the statement of the case, and the magistrate on being served with the rule absolute is to state the case "upon the appellant entering into such recognizance as is hereinbefore provided." Those last words are, I think, clearly needed to meet a case where a magistrate refuses to state a case, and in consequence the applicant in the ordinary course would not before the application for a rule have entered into recognizances, for then, but for the words at the end of s. 5, it might be that a case would be stated and delivered up in obedience to a rule absolute to state a case without any recognizance having ever been entered into at all. Is there anything in this section that should lead us to hold that there is no continuing value in a recognizance entered into at or after the time of making the application, because the magistrate at that period (and not, as in the case which I have hypothetically put, afterwards) determines not to state a case, and the action of this Court has to be invoked? If a recognizance is duly entered

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into to abide certain consequences in the event of a case terminating unfavourably to the appellant, it seems to me that it would not be right for us to hold that that is a recognizance which can be treated as a nullity.

RIDLEY J. I am of the same opinion. I confess the case affords some difficulty, but I agree with the judgments which have been delivered. It must be remembered that the conditions of the recognizance that was entered into on the first application to state a case are as good now as they were—that is to say, the appellant is to prosecute without delay, to submit to the judgment of the Court, and pay such costs as may be ordered. The mere lapse of time, the fact that before the magistrate does state a case an application has to be made to the superior Court to obtain a rule to order him to do so, does not relieve the surety who has entered into this recognizance.

Rule absolute.

Solicitors for applicant: *Henry Gover & Sons.*
Solicitor for respondents: *W. A. Blaxland.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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HEADLAND *v.* COSTER AND ANOTHER.

Poor-rate—Distress—Expenses of Distress—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *Schedule—Distress (Costs) Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

The provisions of the Distress (Costs) Act, 1817, as applied by the Distress (Costs) Act, 1827, to distresses for poor-rate, still remain in operation, and are not impliedly repealed by the Distress for Rates Act, 1849, s. 1; and therefore, in the case of a distress for poor-rate in respect of an amount not exceeding 20*l.*, it is illegal to make any charge for the expenses of the distress in excess of the scale given in the schedule to the Distress (Costs) Act, 1817.

Hill v. *Pannifer*, [1904] 1 K. B. 811, overruled.

APPEAL from the judgment of a Divisional Court in an appeal from the county court of Kent.

The action in the county court was to recover the sum of 5*s.* 7*d.* alleged to have been illegally charged in respect of expenses of a distress for poor-rate, such sum being in excess of the amount prescribed by the schedule to the Distress (Costs) Act, 1817.

The plaintiff and others had declined to pay a portion of sums at which they were respectively assessed to a poor-rate on the ground that they had conscientious objections in respect of the purposes for which that portion of the rate was applicable. A warrant of distress was in consequence granted by justices to levy the amounts which the plaintiff and the others so declined to pay. The total amount of the sums demanded and due for poor-rate did not exceed 20*l.* The defendants were members of the local police force who had acted in execution of the warrant. At the sale of the goods distrained they were bought in for the respective owners at prices arranged to cover in each case the amount of rate unpaid and a proportionate share of charges made for the costs of obtaining the warrant and expenses of the distress. It was admitted by the defendants' counsel in the Court of Appeal for the purposes of the appeal that a small amount had been charged to the plaintiff for expenses of sale

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of the distress in excess of the scale of expenses prescribed in the schedule to the Distress (Costs) Act, 1817. The county court judge held that the Distress (Costs) Act, 1827, by which the provisions of the Distress (Costs) Act, 1817, were made applicable to distresses for poor-rate, had been impliedly repealed by the Distress for Rates Act, 1849; and he found that the amounts which had been charged for expenses of the distress and sale were reasonable. He therefore gave judgment for the defendants.

On appeal to the Divisional Court it was admitted that the matter was concluded in favour of the defendants, so far as that Court was concerned, by the decision of the Divisional Court (Lord Alverstone C.J., Kennedy J., and Channell J.) in the case of *Hill* v. *Pannifer* (1), and the appeal was therefore dismissed, leave to appeal being granted.

Montague Shearman, K.C., and *R. M. Montgomery*, for the plaintiff. It is submitted that the case of *Hill* v. *Pannifer* (1) was wrongly decided, and that the provisions of the Distress (Costs) Act, 1827, which applied to distresses for poor-rate the provisions of the Distress (Costs) Act, 1817, with regard to distresses for rent, are not impliedly repealed by the Distress for Rates Act, 1849. It was held in *Moyse* v. *Cocksedge* (2) that a right to include in the levy under a distress for poor-rate the reasonable expenses of making the distress and of selling the goods distrained arose by necessary implication from the provisions of 43 Eliz. c. 2. There were, however, no means under that Act by which the overseers could recover the costs of obtaining the warrant of distress. Those costs were provided for by 18 Geo. 3, c. 19, but that Act was repealed by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 36, and the Distress for Rates Act, 1849, was passed to provide again for them. It is with those costs that the Distress for Rates Act, 1849, really deals; and the words "together with the reasonable charges of the taking, keeping, and selling of the said distress" were, it is submitted, merely inserted in that Act ex majori cautelâ, in order to prevent any suggestion that,

(1) [1904] 1 K. B. 811. (2) (1748) Willes, 636; Barnes, 459.

on the principle "expressio unius alterius exclusio," the express provision with regard to the costs of obtaining the warrant of distress imported by implication that the expenses of the distress could not be included in the levy. "Together with" merely means "in addition to." The words are not to be construed as creating de novo the right to include in the levy the expenses of the distress, which already existed. But in any case there is really no inconsistency between the provisions of the Distress for Rates Act, 1849, and those of the Distress (Costs) Act, 1817, as applied to distresses for poor-rate by the Distress (Costs) Act, 1827. The provisions of the Act of 1817 only apply to cases where, as here, the amount demanded and due does not exceed 20*l.*; and the two enactments may well stand together, the one as applying to such cases, and the other as applying to cases where the amount of rate demanded and due exceeds 20*l.* Again, it might not be reasonable in all cases in which the sum due does not exceed 20*l.* that the full amounts prescribed by the schedule to the Distress (Costs) Act, 1817, should be charged; and the conjoint effect of the two provisions in such cases might be that the charges must not only be within the amounts fixed by the schedule, but must also be reasonable. A repeal by implication can only be inferred where it is impossible for the earlier and later enactments to stand together: see per Lord Selborne in *Seward* v. *Vera Cruz* (1); *Millington* v. *Harwood*. (2)

[They also cited *Ex parte Arnison*. (3)]

Danckwerts, *K.C.*, and *Stamford Hutton* (*A. E. Gill* with them), for the defendants. The defendants were entitled to judgment in this case. The case of *Moyse* v. *Cocksedge* (4) is really no authority for the proposition for which it has been cited by the plaintiff's counsel. The point really decided in that case was that the person distraining was not converted into a trespasser ab initio by the mere fact that he included in the levy the expenses of the distress; the opinion expressed on the other point was merely obiter, and is, it is submitted, not good law. The right to include in the levy the expenses of

(1) (1884) 10 App. Cas. 59, at p. 68.
(2) [1892] 2 Q. B. 166, at p. 172.
(3) (1868) L. R. 3 Ex. 56.
(4) Willes, 636; Barnes, 459.

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taking, keeping, and selling the distress was not given by the statute of Elizabeth, but was given by the Act 27 Geo. 2, c. 20. The fact that it was thought necessary to pass that Act shews that the view taken in *Moyse* v. *Cocksedge* (1) was not accepted as correct. But that Act was expressly repealed by the Summary Jurisdiction Act, 1848, s. 36. The Distress (Costs) Act, 1817, and the Distress (Costs) Act, 1827, were not Acts conferring a right to charge the costs of distresses, but only Acts regulating the amounts which might be charged, assuming that a right to make the charge existed aliunde. Therefore, when the 27 Geo. 2, c. 20, was repealed, the Distress (Costs) Act, 1827, necessarily ceased to have any operation as to distresses for poor-rate. At the time, therefore, when the Distress for Rates Act, 1849, was passed, the field was quite clear of any legislation with regard to the expenses of distresses for poor-rate; and that Act dealt with the matter de novo. The Act of 1849 itself recites that there is no provision for the expenses of such distresses, and therefore shews that the dictum in *Moyse* v. *Cocksedge* (1) is wrong. On this view, there is no question of any implied repeal by the Act of 1849 of the provisions of the Distress (Costs) Act, 1817, as applied to distresses for poor-rates by the Act of 1827; for the express repeal of the 27 Geo. 2, c. 20, by the Summary Jurisdiction Act, 1848, had swept away all the previous legislation. But it is contended that, even if that be not so, for the reasons given in *Hill* v. *Pannifer* (2), the provisions of the Act of 1849 are inconsistent with those of the Act of 1817 as applied to distresses for poor-rate, and therefore must be deemed to have impliedly repealed them.

[They also cited *Reg.* v. *Price* (3); *Garnett* v. *Bradley* (4); *Lumsden* v. *Burnett* (5); *In re Allen.* (6)]

Montague Shearman, K.C., for the plaintiff, in reply. The statute 27 Geo. 2, c. 20, did not really create the right to include in the levy on a distress for poor-rate the expenses of the distress. It merely recognised the existence of that right

(1) Willes, 636; Barnes, 459.
(2) [1904] 1 K. B. 811.
(3) (1880) 5 Q. B. D. 300.
(4) (1878) 3 App. Cas. 944.
(5) [1898] 2 Q. B. 177.
(6) [1894] 2 Q. B. 924.

as laid down in *Moyse* v. *Cocksedge* (1), and applied the same law to rates other than poor-rate. It would be very remarkable that s. 36, the repealing section of the Summary Jurisdiction Act, 1848, which includes a great number of statutes intended to be repealed with a view to the consolidation and amendment of their provisions by the Act, should contain no reference to the Distress (Costs) Act, 1817, or the Distress (Costs) Act, 1827, if, as suggested, it was intended that they should cease to operate with regard to distresses for poor-rate.

Cur. adv. vult.

Dec. 14. COLLINS M.R. This is an appeal from the decision of a Divisional Court upon an appeal from the judgment of a county court judge in an action brought by the plaintiff, whose goods were distrained for poor-rate, to recover a small sum alleged to have been illegally levied in excess of the charges specified in the schedule to the Distress (Costs) Act, 1817, the provisions of which were applied to distresses for poor-rate by the Distress (Costs) Act, 1827. The contention for the defendants was that, as regards distresses for poor-rates, the provisions of those Acts have ceased to exist, having been impliedly repealed by the Distress for Rates Act, 1849; and that, the only standard prescribed in respect of the expenses of a distress for poor-rate by the last-mentioned Act being that of reasonableness, and the county court judge having found that the charges made by the defendants were reasonable, the judgment must be for the defendants. When the case came before the Divisional Court, there was no argument, but judgment was given in favour of the defendants upon the authority of the case of *Hill* v. *Pannifer* (2), which raised the same point. Consequently, this appeal is virtually an appeal against that decision. The defendants' counsel said that it was not in fact the case that the charges made were in excess of those specified by the schedule to the Distress (Costs) Act, 1817, but that he would admit that they were in order to raise the question. Therefore the short point—for, though it

(1) Willes, 636; Barnes, 459.

(2) [1904] 1 K. B. 811.

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does involve an examination of several statutes, it is in itself a short point—is whether the statutory enactments which specified as regards distresses for poor-rates certain maximum charges for expenses of a distress have been impliedly repealed.

The enactments in question are contained in the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), and the Distress (Costs) Act, 1827 (7 & 8 Geo. 4, c. 17). The first of these two Acts did not originally apply to distresses for poor-rate, but it was made applicable to them by the second. The Distress (Costs) Act, 1817, is, so far as material, in these terms: "Whereas divers persons acting as brokers and distraining on the goods and chattels of others or employed in the course of such distresses have of late made excessive charges to the great oppression of poor tenants and others . . . . be it therefore enacted . . . . that from and after the passing of this Act no person whatsoever making any distress for rent where the sum demanded and due shall not exceed the sum of 20*l.* for and in respect of such rent . . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold . . . . any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the schedule hereunto annexed . . . ." Then comes the schedule, the material words of which are, "catalogues, sale, and commission and delivery of goods, one shilling in the pound on the net produce of the sale." In this case the sum demanded did not exceed 20*l.*, and, therefore, if that scale was applicable at all, it would apply to this case. The scale there laid down was applied by the Distress (Costs) Act, 1827, to the case of a distress for poor-rates. That Act was intituled "an Act to extend the provisions of an Act made in the 57th year of King George the Third, for regulating the costs of certain distresses"; and it provided that, "Whereas by an Act passed in the 57th year of the reign of his late Majesty King George III., intituled an Act to regulate the costs of distresses levied for payment of small rents, certain regulations are made with respect to the costs and charges of levying and disposing of such distresses where the sum demanded and due shall not exceed 20*l.*, and

whereas it is expedient that the said Act should be amended by extending the same to distresses for other causes, be it therefore enacted . . . . that, from and after the passing of this Act, all the rules, regulations, clauses, provisions, penalties, matters, and things in the said Act contained shall extend and be construed to extend, and shall be applied and put in execution so far as the same are applicable and capable of being put in execution with respect to any distress or levy which shall be made for any land tax, assessed taxes, poor's rates, church rates, tithes, highways rates, sewer rates, or any other rates, taxes, impositions, or assessments whatever, in all cases where the sum demanded and due for or in respect of such taxes, rates, tithes, assessments, or impositions, shall not exceed the sum of 20*l*." Therefore the scale laid down in the schedule to the Distress (Costs) Act, 1817, is applicable to the present case, unless the legislation to which I have referred has been repealed.

In the Divisional Court this case was decided entirely on the ground that the subsequent statute of 1849, to which I will at once refer, had impliedly repealed the earlier legislation on the subject. The case has assumed a different aspect before us, and the point upon which it was decided in the Divisional Court has been allowed to fall into the background by the defendants' counsel, who, though he did not abandon it altogether, mainly relied on another point. The Act which is alleged to have repealed by implication the legislation to which I have referred is the Distress for Rates Act, 1849. That statute, which was described as "an Act to enable overseers of the poor and surveyors of the highways to recover the costs of distraining for rates," recited that "provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor, or is rated or assessed in any rate for the highways, in England or Wales, by distress and sale of his goods and chattels . . . . but no provision is made for levying the costs and expenses incurred by the overseers of the poor or the surveyors of highways in the recovery of the same respectively:" and enacted "that it shall be lawful hereafter for all justices of the peace, if

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in their discretion they shall so think fit, in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor or for the highways in England or Wales or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor-rate . . . . to order that a sum such as they may deem reasonable for the costs and expenses which such overseers or surveyors or the persons applying for such warrant shall have incurred in obtaining the same shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress." The Divisional Court in *Hill* v. *Pannifer* (1) treated that enactment as working an implied repeal of the earlier enactments on the subject, and gave judgment accordingly.

This case having come before us on appeal, the plaintiff's counsel argued, with reference to the basis on which the Divisional Court decided in *Hill* v. *Pannifer* (1), that there was no such inconsistency between the provisions of the Act of 1849 and the earlier legislation as to lead to the inference that it was intended to repeal that legislation; and he adduced what appears to me to be an almost conclusive argument on the point, namely, that in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), an Act which was preliminary to the subsequent legislation in the Act of 1849, there was a list of statutes repealed, which includes statutes passed both before and after the Distress (Costs) Act, 1817, and the Distress (Costs) Act, 1827, but no reference is made in that list to either of those Acts. That would be a very remarkable fact, if it was intended to repeal the earlier legislation on this matter; for, by the Act of 1848, it was obviously intended to clear the ground for the operation of the subsequent legislation with regard to summary jurisdiction by repealing all those enactments which it was thought necessary to repeal in view of the

(1) [1904] 1 K. B. 811.

proposed new legislation on the subject; and it would be a very strong thing under those circumstances to say that, in face of the fact that the earlier enactments in question were deliberately omitted from the list of repealed statutes in the Act of 1848, they were nevertheless intended to be repealed by the provisions of the Act of 1849. An enactment may no doubt be repealed by implication under very special conditions. In the case of *Seward* v. *Vera Cruz* (1) there is a very clear statement by Lord Selborne of the principle which governs the question of repeal by implication. He there said: "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." It was pointed out by the plaintiff's counsel that the earlier legislation may well coexist with the provisions of the Act of 1849; for that Act may apply to all cases in which the sum demanded and due exceeds the sum of 20*l.*; and, furthermore, it was rightly said that it is quite compatible with the existence of an enactment giving a scale of maximum charges that there should be an enactment providing that within those maxima the charges must be reasonable. It may well be that the Legislature thought that in some cases the maximum charges in the schedule would be unreasonable, and therefore there was room, without creating any inconsistency, for a provision that, in addition to being within the scale given by the schedule, the charges must also be reasonable. Therefore, taking the case as it stood before the Divisional Court, the inclination of my judgment would be very strongly in favour of the view that there is no implied repeal of the earlier legislation; but, singularly enough, as I shall proceed to shew, an argument used before us on behalf of the defendants appears to me to make the case yet stronger against the defendants than it was as presented in the Court below.

(1) 10 App. Cas. 59, at p. 68.

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The learned counsel for the defendants has relegated to a secondary position the argument which prevailed before the Divisional Court, namely, that the Act of 1849 must be taken to have impliedly repealed the earlier enactments by reason of their inconsistency; and he met the argument of the counsel for the plaintiff by saying that he had wholly misconceived the foundation of the right which he claimed under the Acts of 1817 and 1827. The defendants' counsel argued that those Acts only quantified charges the right to levy which was derived aliunde; that the right to levy such charges as those in question must be found in some earlier enactment; and that it could only be found in the Act of 1754 (27 Geo. 2, c. 20). The 1st section of that statute, so far as material, is as follows: "Whereas by many Acts of Parliament justices of the peace are empowered to issue warrants for the distress and sale of goods and chattels, but the charges of distraining, keeping, and sale of such goods and chattels are not provided for in all the said Acts . . . . whereby inconveniences have arisen: Therefore, for remedy thereof be it enacted . . . . that in all cases where any justice or justices of the peace is or are or shall be required or empowered by any Act or Acts of Parliament now in force or hereafter to be made to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money directed to be paid by or in consequence of such Act or Acts it shall and may be lawful for the justice or justices granting such warrant therein to order and direct the goods and chattels so to be distrained to be sold and disposed of within a certain time to be limited in such warrant . . . . unless the penalty or sum of money for which such distress shall be made together with the reasonable charges of taking and keeping such distress be sooner paid"; and then follows sect. 2, which is in these terms: "And be it further enacted that the officer making such distress shall, and is hereby empowered to, deduct the reasonable charges of taking, keeping, and selling such distress out of the money arising by such sale."

The counsel for the defendants contended that this statute created the right to levy the charges for making and selling

the distress, the amount of which had been only quantified by the Acts of 1817 and 1827; and he pointed out that the Act of 1754 had been repealed by the Summary Jurisdiction Act, 1848. He did not for the purposes of his main argument rely on any repeal by the Act of 1849, but contended that the Act of 1848 had swept away altogether the foundation upon which the right to levy these charges for the expenses of the distress had previously rested, and that it depended now entirely upon the provision of the Act of 1849, which allows the reasonable expenses of the distress to be levied. It had been contended by the plaintiff's counsel at the outset of his argument that no statutory foundation was needed for the right to levy these charges beyond that afforded by the statute 43 Eliz. c. 2. He relied upon a case decided in 1748, namely, *Moyse* v. *Cocksedge* (1), in which it was held that such a right arose by necessary implication from the provisions of the statute of Elizabeth, which created the poor-rate, as being incidental to the right to levy the poor-rate by distress given by that statute. He argued that whether the statute 27 Geo. 2, c. 20, did or did not give a fresh statutory basis for the right was immaterial, but that in point of fact it merely adopted the view taken in *Moyse* v. *Cocksedge* (1) as correct, and applied it to distresses for other rates besides the poor-rate. In *Moyse* v. *Cocksedge* (1) the action was one of trespass, and two questions appear to have been discussed, one being whether there was a right to levy a certain sum for the expenses of a distress for poor-rate, and the other whether, if not, the defendant must be considered as a trespasser ab initio. On reference to the report of the case both points appear to have been decided. It seems to have been decided that there was a right to levy the charge in question, and also that, if there had not been such a right, the defendant would not therefore have been a trespasser ab initio. The defendants' counsel felt that it was necessary to throw his whole strength into the task of impugning the view expressed in that case on the first question, and he sought to shew that it was only an obiter dictum. No one, so far as I know, has ever impugned that decision before the defendants'

(1) Willes, 636; Barnes, 459.

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counsel. It has passed through the text-books on the subject unquestioned, and in my opinion it still stands as a good decision that, before the Act of 1754, there was a right to levy for the expenses of a distress for poor-rate. Having delivered this assault upon the decision in *Moyse* v. *Cocksedge* (1), the defendants' counsel proceeded to contend that, the only basis for the applicability of the schedule to the Distress (Costs) Act, 1817, being the statute 27 Geo. 2, c. 20, and that statute having been repealed by the Summary Jurisdiction Act, 1848, the ground was cleared of all enactments on the subject prior to the Distress for Rates Act, 1849, and the question as to the right to levy the expenses of the distress depended solely on the provisions of that Act. For the reasons which I have given I do not think that the statute 27 Geo. 2, c. 20, was the foundation of the right to levy the expenses of a distress for poor-rate. The right did not require to be created by that statute, because it already existed before that statute was passed, according to the decision in *Moyse* v. *Cocksedge* (1), the authority of which I see nothing to impugn. The 27 Geo. 2, c. 20, seems to me to have been passed for the purpose of extending the right which had been held to exist in the case of distresses for poor-rates to distresses for other rates, and its repeal cannot affect the position of the plaintiff.

The defendants' counsel introduced that statute into the discussion for the purposes of his main argument, which, for the reasons already given, in my opinion fails; but I will now point out how strongly it tells against him on the point on which this case was decided in the Divisional Court. The statute 27 Geo. 2, c. 20, contained the clause which I have read authorizing the deduction of "the reasonable charges of taking, keeping, and selling such distress" from the moneys arising from the sale thereof. That clause coexisted with the Distress (Costs) Act, 1817, and the Distress (Costs) Act, 1827, and it never seems to have been supposed that there was any incompatibility between them. The statute 27 Geo. 2, c. 20, was repealed in 1848, but the substance of it was re-enacted in 1849. What difference can it make that the earlier Act was

(1) Willes, 636; Barnes, 459.

repealed, and a later one to the same effect substituted? If the two provisions could coexist before 1848, they can coexist after 1849. So the statute which the defendants' counsel has introduced upon the scene for the purposes of his main contention has destroyed the foundation of the other contention, which was successful in the Divisional Court. Having regard to the new aspect thus given to the case, I feel bound to differ from the decision of that Court in *Hill* v. *Pannifer*. (1) It seems to have been arrived at with much hesitation by one of the members of the Court, and I do not gather that the other judges were very confident that their conclusion was correct.

There is no doubt one matter which raises some difficulty in the case, namely, the recital in the Act of 1849 to the effect that no provision is made for levying the costs and expenses incurred by the overseers of the poor in the recovery of the poor-rate. That recital is certainly not altogether true, because there was a provision for the recovery of the expenses of the distress arising by implication from the statute of Elizabeth as interpreted by the decision in *Moyse* v. *Cocksedge* (2); but possibly there is a sense in which the recital may be justified. After the repeal of the statute 27 Geo. 2, c. 20, it might be true to say that there was no enactment specifically giving an express statutory right to levy such expenses, as distinguished from a right arising by mere implication from some statute which did not specifically provide for it. In that limited sense the recital may perhaps be looked upon as true, but it is also possible that it may be a misrecital. Such misrecitals are not absolutely unknown even in Acts which have been framed by skilled and careful draftsmen. In any case, however, the argument for the plaintiff seems to me so overwhelming that, even if the adoption of it would involve that there was a misrecital in the Act of 1849, I should feel bound to give effect to it. For these reasons I think the appeal should be allowed.

STIRLING L.J. I am of the same opinion, and will state my reasons as briefly as possible. It is necessary for this purpose

(1) [1904] 1 K. B. 811. (2) Willes, 636; Barnes, 459.

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to deal shortly with the history of the legislation by which provision has been made for the expenses attending the making of distresses for poor-rate and the sale of the goods distrained. The legislation on the subject of poor-rate begins with the well-known Act 43 Eliz. c. 2, which authorizes justices to grant warrants for distress upon the goods of persons making default in payment of poor-rates assessed upon them. That statute contains no express provision with regard to the expenses of taking, keeping, and selling the goods distrained. In 1754 was passed the statute 27 Geo. 2, c. 20, of which the preamble has been already read. That Act provided by s. 1 that the justices might order and direct the goods and chattels distrained to be sold within a certain time unless the sum due "together with the reasonable charges of taking and keeping such distress" should be sooner paid; and by s. 2 that "the officer making such distress shall, and is hereby empowered to, deduct the reasonable charges of taking, keeping, and selling such distress out of the money arising by such sale." The next Act with which we have to deal is the Distress (Costs) Act, 1817, which however relates, not to distress for poor-rates, but to distress for rent. That Act was directed to the remedying of grievances which had been found to arise in the case of poor tenants through the exaction of excessive amounts for expenses by persons making distresses for rent; and it provides a scale of charges, which is to be obligatory upon all persons making distresses for rent where the amount demanded and due does not exceed 20*l*. A question might arise on the construction of this Act, whether the charges mentioned in the schedule are fixed amounts or only maximum charges, but it is unnecessary for the present purpose to go into that question. That Act, as I have said, only dealt with distresses for rent; but in 1827 was passed the Distress (Costs) Act, 1827, which extends the operation of the Act of 1817. The preamble of that Act recites that by the Act of 57 Geo. 3 certain regulations were made with regard to the costs and charges of levying and disposing of distresses for rent, and that it is expedient that the said Act should be amended by extending the same to distresses for other causes; and it is thereby enacted that, from and after

the passing of the Act, all the rules, regulations, clauses, provisions, penalties, matters, and things in the said Act contained shall extend, so far as applicable, to any distress or levy which shall be made for (inter alia) any poor-rate. Therefore the state of things after the passing of that Act was as follows. There were provisions in the Act of 1754 by which persons making distresses for poor-rates were empowered to take reasonable charges in respect of taking, keeping, and selling the distresses; and by the subsequent Act of 1827 those charges were limited to the amounts prescribed by the Act of 1817 in the case of distresses where the sum due did not exceed 20*l*. With regard to that class of cases the Legislature intervened, and defined what should be deemed reasonable charges. We then come to the year 1848. At that time legislation appears to have been in contemplation for the purpose of consolidating and amending the law as to summary proceedings before magistrates. The preamble of the Summary Jurisdiction Act, 1848, recites that "it would conduce much to the improvement of the administration of justice within England and Wales so far as respects summary convictions and orders to be made by Her Majesty's justices of the peace therein, if the several statutes and parts of statutes relating to the duties of such justices in respect of such summary convictions and orders were consolidated with such additions and alterations as may be deemed necessary, and that such duties should be clearly defined by such positive enactment." Nothing in the Act specifically deals with poor-rates, except that in s. 36 it is provided that, from and after the day appointed for the commencement of the Act, certain statutes and parts of statutes shall be repealed, including the statute of 1754, 27 Geo. 2, c. 20. There is, however, no reference in that section to the Distress (Costs) Act, 1817, or the Distress (Costs) Act, 1827, which therefore remained in force. In the following year was passed the Distress for Rates Act, 1849, which deals specifically with distresses for poor-rates and highway rates. The 1st section of that Act makes provision with regard to the matter with which we are dealing by enacting that the justices may in the warrant of distress for such rates order that such a sum as they may deem

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reasonable for the costs and expenses incurred by the overseers in obtaining the warrant may be levied "together with the reasonable charges of the taking, keeping, and selling of the said distress," which is the very same language as was employed in the repealed Act 27 Geo. 2, c. 20. It is also to be observed that s. 7 of the Act provides that, in all cases where such costs and expenses as aforesaid shall have been paid and received, such payment and receipt shall be deemed legal to all intents and purposes. Regard being had to the terms of this Act, it appears to me that it was obviously intended, as regards the charges of taking, keeping, and selling the distress, to restore the state of things which existed before the Act of 1848. It is no doubt true that, on the coming into operation of the Act of 1848, the provisions of the Act 27 Geo. 2, c. 20, thereby repealed ceased to exist; and it is contended by the counsel for the defendants, on the assumption that there was no right otherwise than under that Act to take out of the proceeds of the sale of the distress the expenses of taking, keeping, and selling the same, that the Distress (Costs) Act, 1827, can now have no operation. But that Act was not repealed. It remained on the statute book ready to come into operation as soon as further provision was made with regard to the expenses of distresses for poor-rates, unless the Legislature thought fit to provide otherwise. The Act of 1849 in substance restored the provisions of the repealed Act of 1754, 27 Geo. 2, c. 20, and it did not repeal the Act of 1817, nor in my opinion the Act of 1827. The provisions of those two Acts must, I think, be taken to amount to a definition by the Legislature of what are to be deemed reasonable charges in respect of the expenses of the distresses contemplated by the Acts respectively in cases where the sum demanded and due does not exceed 20*l*. From 1827 to 1848 enactments co-existed, of which one gave generally a right to exact such charges as might be reasonable, and the other imposed specific limitations on those charges in cases where the sum distrained for did not exceed 20*l*. As those provisions were capable of standing together before 1848, it seems to me impossible to say that they cannot stand together now that the provision of the

Act of 1849 has been substituted for what was substantially the same provision in the Act 27 Geo. 2, c. 20. The Distress (Costs) Act, 1827, is, it may be observed, a general Act dealing not only with poor-rates, but with other rates as well, and the limitations which it imposes are still in force, as it appears to me, with regard to distresses for such other rates. As regards distresses for rent it is remarkable that, though subsequent legislation has given power to the Lord Chancellor to make general orders as to the charges to be levied in cases of distress for rent, the scale in the schedule to the Distress (Costs) Act, 1817, has, it appears, substantially been adopted in such orders. It seems to me that the true view is that the Acts of 1817 and 1827 are still in force with regard to distresses for poor-rate, and that the charges contained in the schedule to the former Act are, in cases where the amount in respect of which the distress for poor-rate is made does not exceed 20*l.*, to be deemed to be the reasonable charges for taking, keeping, and selling the distress.

MATHEW L.J. read the following judgment:—I am of the same opinion. In accordance with the statutes 43 Eliz. c. 2, and 27 Geo. 2, c. 20, and the decision in the case of *Moyse* v. *Cocksedge* (1), the reasonable charges for making the distress and for holding and selling the goods seized might be recovered under a warrant of distress for poor-rates. By the statutes of 1817 and 1827 there was enacted what amounted to a description of the charges which were to be deemed reasonable where the levy was for a sum not exceeding 20*l.* This legislation was of a most important character. It was intended to protect people of small means from the exorbitant charges of those to whom the execution of warrants was entrusted. It applied generally to the different kinds of distress warrants mentioned in both Acts. It was legislation intended to secure the rights of the class specified in the statutes. The Act of George II. was repealed by 11 & 12 Vict. c. 43 with a view to its re-enactment with certain amendments, and in the next session the new statute, 12 & 13 Vict. c. 14, became law. It is said

(1) Willes, 636; Barnes, 459.

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that this Act impliedly repealed the statutes of 1817 and 1827 so far as they related to warrants of distress for poor-rates. But I think the three statutes may be, and ought to be, construed together. There is no inconsistency which forbids this method of interpretation. I see no indication of an intention that the general words of the Act 12 & 13 Vict. c. 14 should derogate from the rights conferred by the earlier statutes. The class protected ought not to be deprived of the rights conferred upon them by general words, which do not clearly shew that any such result was intended. This rule of interpretation is indicated in the cases cited in the course of the argument. The reasons for passing the Acts of 1817 and 1827 would seem to be no less cogent in 1849; and without express words I do not think that we are at liberty to infer a repeal by implication. The appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Lloyd-George, Roberts & Co.*
Solicitors for defendants: *Wontner & Sons.*

E. L.

[IN THE COURT OF APPEAL.]

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Dec. 5, 15.

CHESHIRE *v.* BAILEY

Bailment—Master and Servant—Liability of Bailee—Theft by Servant—Scope of Employment.

The plaintiff, a wholesale silversmith, hired from the defendant, a jobmaster, a brougham, horse, and coachman for the purpose of driving the plaintiff's traveller about London with samples of the plaintiff's wares to be shewn to customers. It was known to the defendant that, in the course of business, occasions would arise when the traveller would have to leave the brougham with samples in it in charge of the coachman. On one of such occasions the coachman, in pursuance of an arrangement made with confederates, drove the brougham to a place where a great portion of the samples in it was stolen by them. In an action brought by the plaintiff against the defendant to recover the value of the goods so stolen:—

Held, that the defendant was not responsible in respect of the criminal act of his servant, the same not having been done within the scope of his employment.

Abraham v. *Bullock*, (1902) 86 L. T. 796, distinguished.

APPEAL against the judgment of Walton J. in an action tried by him without a jury.

The action was brought to recover damages for the loss of goods belonging to the plaintiff through the failure of the defendant's servant to take due care of them.

A traveller in the employ of the plaintiff, who was a wholesale silversmith carrying on business at Birmingham, arranged on behalf of the plaintiff with the defendant, a jobmaster in London, for the supply by the latter of a brougham of the kind known as a "commercial brougham," a horse, and a coachman, at the rate of 3*l.* 5*s.* per week of five days, for the purpose of driving the traveller about London with samples of the plaintiff's wares to be shewn to customers. The traveller mentioned at the time when the arrangement for the hire of the brougham was made that a trustworthy coachman would be required. The coachman whom the defendant supplied had received a good character when hired by the defendant, and his conduct had been satisfactory while in the defendant's service.

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It did not appear that the defendant knew what the nature of the plaintiff's business was, but he knew that samples of some value would be carried in the brougham, and also that, for the purposes of visiting customers and of obtaining refreshment, the traveller would often have to leave the brougham with samples in it in charge of the coachman. On one occasion, when the traveller was absent at lunch, the coachman, in pursuance of an arrangement previously made with confederates, drove the brougham to a place where a great portion of the samples in it was stolen by them. Walton J. found in effect that, though the exact character of the samples to be carried in the brougham was not known to the defendant, they were such as he might reasonably be held to have contemplated when he entered into the contract for the supply of the brougham; and, upon the authority of *Abraham* v. *Bullock* (1), he held that the defendant had undertaken that he would by himself, or his servant, take due care of the articles in the brougham during the absence of the traveller. He therefore held that the defendant was liable, and gave judgment for the plaintiff for 800*l.* damages.

Dec. 5. *English Harrison, K.C.*, and *Clavell Salter, K.C.* (*G. Thorn Drury* with them), for the defendant. It may be that the master in such a case as this impliedly undertakes that his servant shall not be negligent in taking care of the goods, which is all that was decided in *Abraham* v. *Bullock* (1); but he does not guarantee the honesty of his servant. The loss of the goods did not occur through the negligence of the servant in not taking due care of them, but through his independent felonious act in stealing them—an act which was outside the scope of his employment. The authorities shew that a bailee for reward is not, generally speaking, liable for the felonious act of his servant not done within the scope of his employment, unless his negligence has conduced to that act or rendered it possible. The plaintiff is really seeking to impose on the defendant the special liability of a common carrier. It would be a great hardship on the master, if he were liable in a case

(1) 86 L. T. 796.

like this. The goods stolen in this case were not like ordinary samples, e.g., samples of some fabric which are not of great value: they were articles of great value in proportion to their bulk, and as such would offer great temptation and opportunities to a thief; and there is no evidence that the defendant had any notice of their character. If he had been informed of it, he would probably not have undertaken any responsibility for them, merely for the small sum paid for the day's hire of the brougham. The servant's negligence is the master's negligence as long as he represents the master, but he does not represent the master in stealing the goods.

[They cited *Finucane* v. *Small* (1); *Jobson* v. *Palmer* (2); *Raw* v. *Cutten* (3); *Clarke* v. *Earnshaw* (4); *Giblin* v. *McMullen* (5); *Speight* v. *Gaunt* (6); *Daniels* v. *Harris* (7); *Coupé Co.* v. *Maddick* (8); *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (9)]

C. A. Russell, K.C., and *Sims Williams*, for the plaintiff. Assuming the contract to be as found by the learned judge, namely, that the master would, through his servant, exercise due care of the articles left in the brougham while the traveller was necessarily absent in the course of his business, it is submitted that it cannot be said that the contract was performed, and there is none the less a breach of the contract because the non-performance of it was under such circumstances as to amount to a crime. The case, therefore, does not come within the authorities with regard to ordinary bailments. In one sense, no doubt, namely, as regards its positive aspect, it cannot be said that the act of stealing the goods was the act of the master; but, in its negative aspect, as involving a failure to perform the contract to take due care of the goods, it may be said to have been within the scope of the servant's employment, and so to amount to a breach of the contract by the master. The case, therefore, comes within the authority of

(1) (1795) 1 Esp. 315.
(2) [1893] 1 Ch. 71.
(3) (1832) 9 Bing. 96; 35 R. R. 518.
(4) (1818) Gow, N. P. 30; 21 R. R. 790.
(5) (1868) L. R. 2 P. C. 317.
(6) (1883) 22 Ch. D. 727; 9 App. Cas. 1.
(7) (1874) L. R. 10 C. P. 1.
(8) [1891] 2 Q. B. 413.
(9) (1887) 18 Q. B. D. 714.

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Abraham v. *Bullock*. (1) The cases which decide that, apart from any contract, a master is not responsible for the felonious act of his servant outside the scope of his employment do not touch the present case. The judge finds that the samples stolen were such as might, as a matter of business, reasonably be held to have been contemplated by the defendant in making the contract.

[They cited *Osborn* v. *Gillett* (2); *Dyer* v. *Munday* (3); *Ellis* v. *Turner* (4); *Hamlyn* v. *Houston & Co.* (5); *Citizens' Life Insurance Co.* v. *Brown* (6); *Liver Alkali Co.* v. *Johnson* (7); *Kettle* v. *Bromsall*. (8)]

English Harrison, K.C., in reply. The crime of the servant in this case broke the connection of service between himself and his master: *Sanderson* v. *Collins*. (9)

Cur. adv. vult.

Dec. 15. COLLINS M.R. read the following judgment:—This is an appeal by the defendant from the decision of Walton J. in favour of the plaintiff. The short facts are that the defendant, a jobmaster, let to the traveller of the plaintiff, a silversmith, what is known in the trade as a "commercial brougham." The defendant, though he did not know the plaintiff's trade, had notice of the purposes for which the brougham was required, namely, that the plaintiff's traveller might be driven about in it by a coachman supplied by the defendant for the purpose of seeking orders and shewing samples. He knew that this would involve carrying samples of some value in the brougham, and that the traveller would have to get out frequently for the purpose of visiting his customers or having refreshment. He agreed accordingly to supply a brougham specially fitted for the purpose, together with a horse and driver. The inferences of fact drawn by Walton J. are not disputed by the appellant. The brougham had been used at intervals extending over several months by one Gray, the

(1) 86 L. T. 796.
(2) (1873) L. R. 8 Ex. 88.
(3) [1895] 1 Q. B. 742.
(4) (1800) 8 T. R. 531; 5 R. R. 441.
(5) [1903] 1 K. B. 81.
(6) [1904] A. C. 423.
(7) (1874) L. R. 9 Ex. 338.
(8) (1738) Willes, 118.
(9) [1904] 1 K. B. 628.

plaintiff's traveller, for the purposes described. On one occasion, when he had with him plate and other articles to the value of about 1000*l.*, the driver, acting in concert with other persons, who as well as the driver were afterwards convicted at the Old Bailey, stole the greater part of the contents of the brougham during the traveller's absence at lunch. Thereupon the plaintiff brought this action claiming to recover from the defendant the value of the stolen goods. Walton J. being, as he conceived, bound by the decision of this Court in the recent case of *Abraham* v. *Bullock* (1), gave judgment for the plaintiff for 800*l.*

Putting that case aside for a moment, I desire to consider whether on principle the decision of the learned judge can be supported. I have come to the conclusion that it cannot. There was no special contract in this case altering the ordinary rights of the parties as implied by law upon a bailment of this class. Technically it seems to come under the class described as locatio operis faciendi. The defendant, though not a common carrier, has come under the ordinary obligations of a person who undertakes for consideration to do the work of carrying the plaintiff's traveller and his goods to such destination as he shall direct. He is bound, therefore, to bring reasonable care to the execution of every part of the duty accepted. He may perform that duty by servants or personally, and, if he employs servants, he is as much responsible for all acts done by them within the scope of their employment as he is for his own. But he is not an insurer, and is not answerable for acts done by his servants outside the scope of their employment. Hence he is not responsible for the consequences of the crime committed by the driver in this case, which was clearly outside the scope of his employment, unless it can be shewn that the happening of the crime was due to the defendant's negligence. It is a crime committed by a person who in committing it severed his connection with his master, and became a stranger; and, as the circumstances under which it was committed are known, it raises no presumption of negligence in the defendant. He took reasonable care to perform his duty in that he sent

(1) 86 L. T. 796.

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out a servant whom he reasonably supposed to be trustworthy to drive the brougham and watch its contents in the traveller's absence, and he was not bound to do more. That an ordinary contract of bailment of this class does not involve a warranty that the servant shall not turn thief, and so cease to adhibit reasonable care, where the master has devolved the duty of custody on the servant, is clear from the fact that no class of bailee except common carriers and innkeepers are now at common law deemed responsible for the theft of their servants unless such theft was attributable to the negligence of the master. This immunity rests on the combination of two well-established factors—(*a*) that such bailees are only bound to ordinary care; (*b*) that quâ masters they are not responsible for acts done by their servants outside the scope of their employment. It is not necessary to refer to the authorities in detail which support these propositions. They will be found collected in *Coggs* v. *Bernard* (1) and the notes thereto in Smith's Leading Cases.

This being, in my view, the law clearly established as the result of many authorities, it remains to consider whether we are bound in this Court to hold the contrary by reason of the case on which Walton J. acted. I have carefully reconsidered that case, and am quite satisfied that the decision is right, and that it does not support the decision under appeal. The short facts there were that the driver of a commercial brougham, hired under similar circumstances, negligently left the brougham unguarded while the traveller was at lunch, and thus gave opportunity to thieves to steal its contents. The negligence of the servant in that case was clearly committed within the scope of his employment, and was therefore negligence for which the master was responsible just as much as if he had elected to watch himself instead of doing it by his servant and had then neglected it in the same manner. The case is reported only in 86 L. T. 796, and I am there reported to have said, "I think that the defendant was under an obligation to use ordinary care in looking after the carriage in Cohen's "—that is, the traveller's—" absence, and that his servant failed

(1) (1703) 2 Ld. Raym. 909; 1 Sm. L. C. 11th ed. p. 173.

in that respect." This seems to be substantially accurate. The proposition I was combating was that of the judge below, namely, that it was not in the scope of the driver's duty to protect the goods as the servant of the defendant, so that the latter was not liable for negligence in the performance of any duty owed by him; and I am reported to have said, "It is a reasonable and proper inference to draw from the contract, and the circumstances under which it was made, that the defendant undertook to supply a driver who would take ordinary care of the carriage when Cohen was obliged to leave it." Substitute for "who would" in the above sentence "whose business it should be to," and I think it would be verbally accurate. Again, lower down I say, "The very thing contemplated by the obligation on the defendant to take care of the carriage in Cohen's absence was the guarding against the possibility of a thief taking the jewels." I certainly did not intend to hold in that case that the defendant warranted that due care should be taken, though I did hold that he was responsible if his servant, acting in the scope of his employment, did not take it. I regret that any infelicity of language on my part should have misled Walton J. I think that the appeal must be allowed.

STIRLING L.J. I agree. I think the implied obligation on the part of the jobmaster, which was held by this Court to exist in the case of *Abraham* v. *Bullock* (1), ought, so far as regards the acts of the jobmaster's servants, to be restricted to acts done by them in the course of their employment. For the existence of such limitation the case of *Sanderson* v. *Collins* (2) appears to me to be an authority. The head-note is: "The defendant sent his carriage to be repaired by the plaintiff, who was a coachbuilder. The plaintiff lent a carriage of his own to the defendant for use while the repairs were going on. The coachman of the defendant, without his knowledge, took the plaintiff's carriage out for his own purposes, and, while he was driving the carriage, it was injured through his negligence. In an action to recover the cost of repairing it, held, that, as the coachman at the time when the injury was done to the carriage

(1) 86 L. T. 796. (2) [1904] 1 K. B. 628.

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Stirling L.J.

was not acting in the course of his employment, the defendant was not liable." There are a few observations of Romer L.J. which seem to me to apply to the present case. He says: "It is admitted that, when the arrangement was made between the plaintiff and the defendant, no special contract was made with regard to the obligations to be undertaken by the defendant. What, then, are the obligations that must be implied? Certainly the insurance of the safe return of the carriage is not one of them." That applies, with slight verbal alterations, here also. Then he proceeds: "The case is one of an ordinary bailment for mutual benefit, and the defendant as bailee is under an obligation, now well settled in law, by which he was bound to take reasonable care of the chattel entrusted to him, but was not liable for loss or injury which might happen to it during the bailment unless caused by his negligence or that of his servants acting in the course of their employment." Here also the bailment, though of a slightly different nature, is one by which the defendant was bound to take only reasonable care of the chattels entrusted to him, and, in my opinion, was not liable for loss or injury unless caused by his own negligence or that of his servant acting in the course of his employment. Here there was no evidence of any negligence on the part of the defendant; and, as regards the coachman, it seems to me that he ceased to be acting in the course of his employment when he drove away from the spot where the plaintiff's traveller had left the brougham and proceeded to meet his accomplices for the purpose of committing a criminal act. I think, therefore, the appeal ought to be allowed.

MATHEW L.J. read the following judgment:—I see no reason to doubt that in a contract of this kind the jobmaster undertakes with the hirer that the coachman will take care to protect the goods in the brougham from damage or depredation. This was the decision of this Court in *Abraham* v. *Bullock*. (1) The object of the present action was to establish that the defendant had guaranteed the honesty of his servant, and was therefore responsible for the theft of which the coachman had been

(1) 86 L. T. 796.

guilty. But I see no ground for the implication of any such undertaking on the part of the defendant. It was not shewn that the plaintiff had informed the defendant that he insisted upon any such liability on the part of the defendant. If he had done so, there seems little reason to doubt that the defendant would have declined to take upon himself without remuneration the obligation of an insurer. The coachman was not such a person as would, in the ordinary course of business, have been entrusted for safe keeping with money or money's worth to the amount of many hundreds of pounds. The true inference from the facts would seem to be that the plaintiff relied for the protection of his property, not upon any contract with the defendant, but upon the strong arm of the criminal law, and the dread which is felt of being brought within its grasp. The plaintiff had no reason to assume that the coachman, in committing a crime, would be acting within the scope of the authority given him by his master, which must be measured by reference to the ordinary duties of a coachman. In the absence of any evidence of a contract the law applicable to the case would seem to be clear. Any departure by the servant for his own purposes from the discharge of his ordinary duties would relieve his master from responsibility, and, from the time that the coachman drove the brougham to the public-house with the intention of assisting in the theft of the contents, the master ceased to be liable for any loss or damage that followed. The contract between the plaintiff and the defendant must be regarded as having been made on the footing of this well-known rule of the law of master and servant. The defendant is no more liable than he would have been if the brougham and its contents, without negligence on the part of the coachman, had been carried away by a stranger. The authority relied upon by Walton J. is distinguishable from the present case, and I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *G. F. Hudson, Matthews & Co.*
Solicitors for defendant: *H. Clifford Turner & Co.*

E. L.

C. A.
1904
Nov. 30.

[IN THE COURT OF APPEAL.]

HYMAS *v.* OGDEN.

County Court—Practice—Judgment for Delivery of Specific Chattel—Warrant of Delivery—Wilful Refusal to deliver—Attachment—County Court Rules, 1903, *Order* XXV., *rr.* 57, 69.

A county court judge has jurisdiction to order a warrant of attachment of a defendant who, in an action for the recovery of a chattel, wilfully refuses to comply with a judgment for the return of the chattel, and this jurisdiction is not affected by the fact that the bailiff to whom a warrant of delivery was issued directing him to seize the chattel, and if it could not be found to distrain the lands and chattels of the defendant, did not, on failure to find the chattel, distrain under the warrant.

APPEAL from a judgment of a Divisional Court affirming an order of the judge of the Mansfield County Court.

The action was brought against the defendant in the county court claiming the return of the plaintiff's running dog Floss, alleged to be wrongfully detained by the defendant, or 40*l.* its value, and 10*l.* damages for its detention. At the trial judgment was given for the plaintiff. The judgment was drawn up in the following form (see County Court Rules, 1903, Form 292): "Upon the trial of this action at this Court, holden this day, it is adjudged that the plaintiff do recover against the defendant the following goods and chattels of the plaintiff wrongfully detained by the defendant—that is to say, the plaintiff's running dog Floss, and also costs. And it is ordered that the defendant do return the said dog to the plaintiff within seven days from this date, and that in default of his so doing a warrant of delivery do issue." The dog was not delivered up by the defendant within the seven days, and a warrant of delivery was issued. The warrant of delivery, which was in the ordinary form (see County Court Rules, 1903, Form 293), after reciting the judgment and that the defendant had not returned the dog to the plaintiff, directed the bailiff "forthwith to seize the said goods and chattels so not returned as aforesaid, wheresoever they may be found within the district of this Court, and to deliver the same to the plaintiff. And if

the same cannot be found by you within such district, you are required and ordered to distrain all the lands and chattels of the defendant wheresoever they may be found within the district of this Court, and them hold until the defendant shall deliver the said goods and chattels to you, and to make return of what you have done under this warrant immediately upon the execution thereof." The county court bailiff endeavoured to obtain possession of the dog under the warrant of delivery; but he failed to do so, and did not distrain the defendant's goods. Subsequently an order was made that the defendant should attend before the judge for examination, and notice was given to the defendant that an application would be made for a warrant of attachment for not complying with the order to deliver up the dog. The defendant attended and was examined, and evidence was given on behalf of the plaintiff that the defendant had been in a position to obey the order for the return of the dog, but had wilfully refused to do so, and had taken steps to prevent the plaintiff from recovering possession of the dog. The judge thereupon made an order for a warrant of attachment to issue, but directed that the warrant should remain in court for seven days, and that if in the meantime notice of appeal should be given, and the dog placed in the custody of a third person, the warrant should be suspended pending the appeal.

From that order the defendant appealed. The Divisional Court (Lord Alverstone C.J., Kennedy J., and Ridley J.) dismissed the appeal.

The defendant appealed.

Israel Davis, for the defendant. The order to attach the defendant was made without jurisdiction. Where such a power is given it is so expressly, as in s. 162 of the County Courts Act, 1888. That section limits the power to commit for contempt to a period of seven days, and under the Debtors Act, 1869, the limit is six weeks; but the power claimed in this case is unrestricted in point of time. What was in fact done was to order an attachment as might be done in the Court of Chancery; but that is not contemplated in the County

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Court Acts or rules—indeed, it is doubtful if that Court has any remedy on disobedience of such an order as this except distringas. In *Martin* v. *Bannister* (1) it was decided that a county court has jurisdiction to grant an injunction and to enforce obedience by committal; but, as Cotton L.J. points out, that jurisdiction is to be exercised according to the County Court Rules, and no rule is to be found allowing this remedy for disobedience in such a case as the present. Further, that decision must be read by the light of the decision in *Foster* v. *Reeves* (2), to the effect that an equitable remedy can only be applied where the Court has equitable jurisdiction over the subject-matter dealt with. In the rules in force in the High Court with regard to the recovery of property other than land or money, one of the modes of enforcing an order is by Order XLII., r. 6, which gives alternative remedies, one of them being by writ of attachment; but no such power is mentioned in the County Court Rules. There is a further objection that before the warrant for delivery was issued the value of the goods seized should have been assessed: *Corbett* v. *Lewin* (3); and that was not done in this case. The warrant of delivery points out the remedy for enforcing the order—namely, by distraint of the defendant's lands and chattels. Having elected to follow a common law remedy, the plaintiff could not afterwards proceed to put in force the equitable remedy by attachment, even if that remedy existed: *Drewitt* v. *Edwards* (4) and *Dowling* v. *Betjemann*. (5)

Etherington Smith, for the plaintiff, was not called on.

COLLINS M.R. This is an appeal from a judgment of a Divisional Court, whereby they refused to disturb an order of a county court judge directing a warrant of attachment of the defendant in certain events. The action was brought to recover a dog, and judgment was given in terms for the return of the dog to the plaintiff within seven days, and in default of this being done that a warrant of delivery should issue. The

(1) (1879) 4 Q. B. D. 491.
(2) [1892] 2 Q. B. 255.
(3) [1884] W. N. 62.
(4) (1877) 26 W. R. 60, 122.
(5) (1862) 2 J. & H. 544.

defendant did not return the dog, and by not doing so he refused to obey the order of the Court. Thereupon a warrant of delivery was issued, but it was not successful in producing the dog. Steps were then taken to give the defendant an opportunity of shewing cause why he should not be attached for contempt, and evidence was given at the hearing which justified the judge in coming to the conclusion that the defendant had wilfully refused to obey the order of the Court. Thereupon the judge made an order giving the defendant seven days in which to comply with the judgment, and directing the issue of a warrant of attachment if the order to give up the dog was not complied with. He suspended this order on the conditions that the dog was placed in the custody of a third person, and that an appeal was brought within the seven days mentioned in the order. The defendant accordingly exercised the right to appeal so given, and the Divisional Court dismissed his appeal.

It was contended that the county court judge had no power to make the order for attaching the defendant; but it seems to me that this matter is clearly provided for by the Judicature Act, 1873, and the County Courts Act, 1888. It is said that the power to commit is exclusively derived from the equity jurisdiction of the county court, and could not be exercised except where the county court has equitable jurisdiction over the subject-matter of the action. The matter has been specifically dealt with in s. 89 of the Judicature Act, 1873. That section relates to the powers of inferior Courts having equity and Admiralty jurisdiction, and declares that such a Court "shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional," in as full and ample a manner as the High Court might in the like case. I turn next to Order XXV., r. 57, of the County Court Rules, 1903: "Orders in the nature of an injunction, and all orders, interlocutory or otherwise, within the competency of the Court, which, if the same were made in an action or matter pending in the High Court, could in

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such Court be enforced by attachment of the person or committal, may be enforced by order of the judge by warrant of attachment, which shall be according to the form in the Appendix." The High Court has now, in an action of detinue, power to order the defendant to hand over the goods claimed; and if he disobeys such an order the Court has power to enforce it by attachment. The county court rule provides for the exercise of a similar power by a county court judge, and under these circumstances it is clear that the power to order attachment existed in this case. It was, however, contended that by obtaining a warrant of delivery the plaintiff lost the remedy by attachment to enforce the order to deliver up the dog. I do not think that the obtaining the warrant of delivery had that effect. The judgment in the action was not an alternative judgment, but the very essence of the matter was the obligation to hand over the dog, and that obligation was not affected by the issue of the warrant of delivery. It was further said that cases shewed that it was a condition precedent to the making of an order for delivery of a chattel that its value should be appraised. If that was ever the law it was a highly technical matter which has been cured by Order XLVIII., r. 1, of the Rules of the Supreme Court. The reason for the rule in its final form is explained in a note to the rule in the Annual Practice, where it is said that the addition of the words "if any" after the words "upon paying the value assessed," appears to make the rule applicable whether the value of the property has been assessed or not. The rule, therefore, gets rid of any difficulty as to the assessment of value that might have existed previously in cases where there was no desire to take money in lieu of the chattel which was detained from the owner.

I think that none of the arguments put forward for the defendant have succeeded, and that the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The case appears to me to be covered by Order XXV., r. 57, of the County Court Rules, 1903, which provides that, "Orders in

the nature of an injunction, and all orders, interlocutory or otherwise, within the competency of the Court, which, if the same were made in an action or matter pending in the High Court, could in such Court be enforced by attachment of the person or committal, may be enforced by order of the judge by warrant of attachment, which shall be according to the form in the Appendix." The first question to be considered is whether the order made in the action was within the competence of the Court, and it has not been suggested that it was not. The order was made in an action of detinue for the return to the plaintiff of the dog to which the action related. Then how, supposing such an order to be made in an action pending in the High Court, could it be enforced? Order XLII., r. 6, of the Rules of the Supreme Court points out how this can be done. The rule says that a judgment for the recovery of any property other than land or money may be enforced in three ways, one of which is "by writ of attachment," and rule 7 of the same order is: "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal." Thus there are two rules, either of which would entitle the plaintiff to a remedy in the High Court, in a case similar to the present, by the attachment of the defendant. The county court judge had, therefore, ample authority to order that the warrant of attachment should issue. With regard to Order XLII., r. 6, it was argued that the three ways of enforcing a judgment for the recovery of any property there mentioned were alternative, and that as there had been an order for delivery of the property no order could be made for attachment. With this argument I cannot agree, for in my opinion the remedies given by the rule are cumulative and not alternative. I think, therefore, that the appeal fails.

MATHEW L.J. I am of the same opinion. It is clear that if this action had been brought in the High Court there would have been power to enforce the judgment obtained by the plaintiff by means of attachment. It is said that as the action was in the county court that remedy is not open to the

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Mathew L.J.

plaintiff. It would certainly be a lamentable state of things if a man seeking to recover his property should be forced into the High Court because he would only get an inadequate remedy if he sued in the county court. Looking at Order XXV., r. 57, it appears that orders which it is competent to the county court judge to make may be enforced by attachment, provided that if the order had been made in an action in the High Court that remedy would have been available. Detinue is an action that can be brought in the county court. An order for the return of the chattel is within the competence of that Court, and consequently such an order can be enforced, as it was in this case, by order of the judge by warrant of attachment.

The decision of the Divisional Court was right and should be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Halse, Trustram & Co., for A. Muir Wilson, Sheffield.*

Solicitors for defendant: *Stevens, Son & Parkes, for Jones & Middleton, Chesterfield.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
Nov. 22.

EARL *v.* LUBBOCK.

Negligence—Contract with Owner to repair Van—Negligent Repair—Injury to Driver arising from Defect—Liability of Contractor—Duty owed to Driver.

The defendant contracted to keep in repair a number of vans owned by a firm. The plaintiff was a driver in the employment of the firm, and while he was driving one of the vans a wheel came off and he sustained injuries by falling from the van. The van had been in the hands of the defendant's workmen shortly before and on the day of the accident, and the plaintiff's cause of action was based upon the negligence of the workmen in failing properly to inspect and repair the defective state of the van, and the negligent manner in which the repairs were done:—

Held, affirming the judgment of a Divisional Court, that the defendant was under no duty to the plaintiff, and that there was no cause of action.

Winterbottom v. *Wright*, (1842) 10 M. & W. 109; 62 R. R. 534, followed.

APPEAL from the judgment of a Divisional Court affirming an order of the judge of the Lambeth County Court.

The action was brought in the county court to recover damages for personal injuries sustained by the plaintiff, and alleged to be due to the negligence of the defendant. The plaintiff was a driver in the employment of a firm who owned a number of vans. The defendant was a master wheelwright, and he entered into a contract with the firm to keep their vans in good and substantial repair. In pursuance of his contract the defendant sent his men frequently to the premises of the firm to examine into the condition of the vans and to do the necessary repairs. On one occasion, upon the complaint of the plaintiff that the van he drove ran heavily, one of the defendant's men took off the wheel and oiled and replaced it, but, being unable to replace the cap of the axle, he nailed a piece of zinc over the box of the wheel to keep the cap from falling off. A fortnight later the wheel was again attended to by one of the defendant's men. After this had been done and on the same day the plaintiff while driving the van was thrown to the ground by reason of the wheel coming off, and he sustained the injuries in respect of which he sued. The

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allegation in the particulars of claim was that the defendant's man negligently failed to properly inspect the wheel and repair its defective condition, and that the repairs to the wheel were done in a negligent and unskilful manner, whereby the accident to the plaintiff happened. The action was tried before the judge and a jury, and at the close of the plaintiff's case it was submitted that there was no evidence of negligence on the part of the defendant, and that even if there was evidence of negligence the defendant was not liable in the action as he owed no duty to the plaintiff, his only duty being to the firm with whom he had contracted. Upon this latter ground the county court judge entered judgment for the defendant.

The plaintiff appealed, and a Divisional Court, consisting of Lord Alverstone C.J., Wills J., and Kennedy J., affirmed the decision of the county court judge.

The plaintiff appealed.

Arthur Powell, K.C., and *W. M. Thompson*, for the plaintiff. The case for the plaintiff does not rest upon contract or upon negligence of omission, but on the negligence of the defendant in an act done by his servant in the course of his employment. The difference in the liability arising from a mere non-feasance and that which follows on an act of misfeasance is dealt with by Bramwell B. in *Hayn* v. *Culliford*. (1) For the consequences of an act wrongful in itself the doer of the act is responsible to any one who is injured thereby. The decision in *George* v. *Skivington* (2) has never been overruled, and it shews that the defendant owed a duty to the plaintiff as one of a limited class who would use the van, even if it was not known to the defendant that the plaintiff was the actual driver of the van. *Winterbottom* v. *Wright* (3) does not conflict with this view, for that case was based on the failure of duty of the defendant under his contract to keep the mail-coach in repair, and the declaration alleged an omission and not an act of misfeasance. This case comes within the conditions as to liability stated by Cotton L.J. and agreed to by Bowen L.J. in *Heaven* v.

(1) (1879) 4 C. P. D. 182, at p. 185. (2) (1869) L. R. 5 Ex. 1.
(3) (1842) 10 M. & W. 109; 62 R. R. 534.

Pender (1), and it is not necessary to rely on the broader view taken by Lord Esher M.R. in that case, though that would certainly cover the present case.

[They cited *Longmeid* v. *Holliday* (2); *Thomas* v. *Winchester* (3); *Farrant* v. *Barnes* (4); *Parry* v. *Smith* (5); *Le Lievre* v. *Gould* (6); *Clarke* v. *Army and Navy Co-operative Society*. (7)]

Montague Lush, K.C. (*Lincoln Reed* with him), was not called upon, but he referred to the remarks of Lord Herschell in advising the House of Lords in *Caledonian Ry. Co.* v. *Mulholland* (8), in which it was pointed out that the defendant in *Heaven* v. *Pender* (1) was held to be responsible because he invited the plaintiff to come upon the staging, and the plaintiff was so led into a trap by means of which he was injured.

COLLINS M.R. This appeal arises in a case in which the plaintiff, who was a driver in the employment of the owners of vans, brought an action to recover damages from the defendant, who was under a contract with the owners of the vans to repair them. The plaintiff was injured by reason of the wheel of the van which he was driving coming off. He brought an action in the county court, and the learned judge, after hearing evidence as to the circumstances under which the wheel came off and having heard the arguments on the point made for the defendant that he was under no duty to the plaintiff in respect of the accident, decided as a matter of law that there was no cause of action.

In my opinion this case is concluded by the authority of *Winterbottom* v. *Wright* (9), the circumstances of which are indistinguishable from those of the present case, and that ecision, since the year 1842 in which it was given, has stood the test of repeated discussion. Under these circumstances it would, in my opinion, be a waste of time to go through the numerous cases that have been cited, for the principles laid

(1) (1883) 11 Q. B. D. 503.
(2) (1851) 6 Ex. 761.
(3) (1852) 6 N. Y. 397.
(4) (1862) 11 C. B. (N.S.) 553.
(5) (1879) 4 C. P. D. 325.
(6) [1893] 1 Q. B. 491.
(7) [1903] 1 K. B. 155.
(8) [1898] A. C. 216, at p. 226.
(9) 10 M. & W. 109; 62 R. R. 534.

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down by Lord Abinger C.B. in the case that I have mentioned appear to me to be based upon sound reasoning, and to be conclusive in this case. The view taken by the Court is thus expressed by the Chief Baron at p. 114 of the report: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of a public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained under the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? that would, at all events, have defeated his claim altogether. By permitting this action we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him." It seems to me that the principle there laid down is conclusive in the present case. In my judgment no question arises here as to the delivery of a dangerous thing, which is one of the circumstances that can give rise to a cause of action in a person who is not a party to the contract. Such a case is dealt with by Parke B. in delivering the judgment of

the Court of Exchequer in *Longmeid* v. *Holliday* (1) thus: "And it may be the same"—that is, responsibility may arise—"when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon* v. *Bell*. (2) But it would be going too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." Here there is the case of a carriage which, so far as the evidence goes, was not visibly out of repair. Apparently the wheel required oiling, and for that purpose the cap was removed, and, as it was defective, a piece of zinc was nailed on to the wheel. That had nothing to do with the accident, but was done to supply a better means of oiling the wheel; and, in my opinion, the van cannot fall within the category of dangerous articles to which Parke B. alludes. One other ground was suggested upon which the defendant might be held to be liable. That is the principle affirmed in *Heaven* v. *Pender* (3), that where a person having a common interest with another invites that person to use certain premises or chattels, the person so inviting incurs a responsibility with regard to the condition of the premises, or of the chattels, as the case may be. Nothing of that kind can be set up in this case. It was hardly contended that such considerations were applicable to this case; but it was said that it came within the dictum enunciated by Lord Esher in his judgment, as to the duty to use ordinary care and skill to avoid a danger to another that a person of ordinary sense would

(1) 6 Ex. 761, at p. 767. (2) (1816) 5 M. & S. 198; 17 R. R. 308.
(3) 11 Q. B. D. 503, at p. 515.

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recognise as likely to arise if he did not use that ordinary care and skill in his own conduct. That, however, was not a decision of the Court, and it was subsequently qualified and explained by Lord Esher himself. (1) I have pointed out what was the judgment of the Court, and the plaintiff has entirely failed to bring his case within the principle of that judgment, and this appeal must fail.

STIRLING L.J. I am of the same opinion. In order to succeed in this action the plaintiff must bring his case within the proposition enunciated by Cotton L.J. and agreed to by Bowen L.J. in *Heaven* v. *Pender* (2), to the effect that "any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act." That passage was cited to the county court judge, and was relied on in this Court by counsel for the plaintiff. As to the first part of that proposition, with regard to a dangerous instrument, I take it that the reference is to a thing dangerous in itself, and that is shewn by the illustration that is given, and also by what is stated in the second part of the proposition which treats of an instrument or thing in such a condition as to cause danger, not necessarily incident to its use. I think, therefore, that the van which the plaintiff was driving does not fall within the first branch of the sentence that I have quoted, and that to succeed the plaintiff must bring the case within the second part. In that case he must adduce evidence to shew that to the knowledge of the defendant the van was in such a condition as to cause danger, not necessarily incident to its use. It appears to me that the plaintiff was not in a position to do this, and consequently he failed in establishing the liability of the defendant, and this appeal must be dismissed.

(1) See *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, at p. 497.
(2) 11 Q. B. D. 503, at p. 517.

MATHEW L.J. I am of the same opinion. The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that any one in their employment, or, indeed, any one else who sustained an injury traceable to that negligence, had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade. There was in this case no evidence before the learned county court judge that this van was in a state that made the defendant liable under any of the conditions of liability that have been laid down in the cases to which reference has been made. Further, there was no evidence that the plaintiff was invited by the defendant to use the van. I concur in thinking that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Buchanan & Hurd.*
Solicitors for defendant: *Sayle, Carter & Co.*

A. M.

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Dec. 9.

[IN THE COURT OF APPEAL.]

DAWSON *v.* GREAT NORTHERN AND CITY RAILWAY COMPANY.

Lands Clauses Acts—Compensation—Lands injuriously affected—Assignment of Right to Compensation — Lands Clauses Consolidation Act, 1845 (8 *& 9 Vict. c.* 18), *s.* 68—*Judicature Act*, 1873 (36 *& 37 Vict. c.* 66), *s.* 25.

A claim, under s. 68 of the Lands Clauses Consolidation Act, 1845, to compensation in respect of an interest in lands, injuriously affected within the meaning of that section, is not a claim to damages for a wrongful act, but a claim of a right to compensation for damage which might be done in the lawful exercise of statutory powers, and such a claim is capable of assignment.

Judgment of Wright J., [1904] 1 K. B. 277, reversed.

APPEAL and cross-appeal from the judgment of Wright J., reported [1904] 1 K. B. 277.

The defendant railway company constructed under statutory powers a tunnel under or near certain houses in which the plaintiff was interested and in which she carried on business, and she claimed to be entitled to compensation on the ground that her interest in the houses had been injuriously affected by structural damage to the houses and by damage to trade stock. An inquiry was held under the Regulation of Railways Act, 1868, s. 41, before Ridley J. and a jury, and the jury assessed the compensation for structural damage at 2000*l.*, and that for damage to trade stock at 2100*l.* The action was brought to recover 4150*l.*, which included a sum of 50*l.* the claim to which was abandoned. By agreement between the parties the other sums of 2000*l.* and 2100*l.* were attributed in equal third parts to three separate portions of the plaintiff's holding, which were distinguished as "the freeholds," the "Berry and Vickery leaseholds," and the "Hewitt leaseholds," as to which different considerations arose.

With regard to "the freeholds," these were vested in one Blake in fee simple, subject to a lease vested in the plaintiff. By agreement between Blake and the railway company the

latter agreed to purchase for 850*l.* the right to maintain and use a tunnel in and through the portion of Blake's property therein defined, and the sum so to be paid was to include compensation for all damage, loss, or inconvenience occasioned to the land the subject of the agreement, except for structural damage through drainage or subsidence caused by the works of the company. At a later date Blake conveyed the freeholds to the plaintiff subject to the easement granted to the company, and Blake as beneficial owner purported to assign to the plaintiff all the rights, benefits, and advantages of him, Blake, conferred by or to be derived from his agreement with the company so far as the same related to the hereditaments conveyed to the plaintiff, save and except the purchase-money of 850*l.* which Blake was to be entitled to receive.

With regard to the "Berry and Vickery leaseholds," after damage had been done to the premises, Berry assigned the lease of the houses held by him to the plaintiff, and by a deed of even date, reciting that the premises had been damaged by the works of the company, he further assigned to the plaintiff all sums of money which he might be entitled to recover from the company by way of compensation for structural damage caused by the execution of the defendants' works, and all his rights of every description against the company in relation thereto. Vickery similarly assigned to the plaintiff the lease of his house and all his rights against the company in respect of structural damage to the premises. Notice of these assignments was given by the plaintiff to the company.

With regard to the Hewitt leaseholds which were acquired by the plaintiff other considerations arose, which are dealt with in the judgment of the Court.

At the trial of this action before Wright J. the learned judge, as appears by a note to the report of the case in the Court below, held that the claim in respect of the freeholds was of an interest created after the date of the notice to treat, and fell within the decision of the Court of Appeal in *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (1), subsequently affirmed in the House of Lords (2), that it was

(1) [1903] 1 K. B. 652. (2) [1904] A. C. 461.

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not competent for an owner of land who has received notice to treat to deal with his land so as to increase the burdens of the company as regards compensation. He also decided with regard to the Berry and Vickery leaseholds that compensation for injuriously affecting an interest in lands under s. 68 of the Lands Clauses Consolidation Act, 1845, is in the nature of damages for a tort, and that the right to sue for it could not be assigned. As to the Hewitt leaseholds, the learned judge decided, upon the facts before him, in favour of the plaintiff. The plaintiff appealed against so much of the judgment as related to the freeholds and the Berry and Vickery leaseholds, and the defendants entered a cross-appeal as to the Hewitt leaseholds.

1904. Nov. 16. *Sir Edward Clarke, K.C.*, and *Cripps, K.C.* (with them *Harry Dobb*), for the plaintiff. As to the freeholds, the principle involved in the decision in *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (1) does not apply. The question of compensation for structural damage was expressly reserved in the agreement between Blake and the company, and consequently the transaction between Blake and the plaintiff placed no additional burden on the company. The damage arose after the freeholds had passed to the plaintiff; but the right to compensation was a chose in action the value of which was not ascertained, but which was capable of being assigned, for the expression is not limited, as pointed out by Lord Blackburn in *Colonial Bank* v. *Whinney* (2), to the right to sue for a debt or damages. A claim for compensation is not a claim for damages arising out of a tort or a contract, but it is a legal right that can be enforced by legal procedure. It is impossible to say that an action of tort would hold good against the company for doing that which its special Act authorizes. It is submitted that the decision of the learned judge in respect of the freeholds and the Berry and Vickery leaseholds cannot be supported, and that the plaintiff is entitled to the amounts awarded by the jury in respect of those premises, other than

(1) [1903] 1 K. B. 652; [1904] A. C. 461.

(2) (1886) 11 App. Cas. 426, at p. 439.

the claim for damage to trade stock in the case of the leaseholds.

McCall, K.C., and *George Cave*, K.C. (*C. C. Hutchinson* with them), for the defendants. With regard to the freeholds, it is submitted that the plaintiff is not entitled to recover any part of the compensation assessed. The only interest in respect of which she might have been entitled to compensation was the residue of the term vested in her at the date of the notice to treat. She is claiming compensation as owner in fee, and by a title derived from Blake after the notice to treat served upon him. She cannot as such owner claim compensation independently of Blake or otherwise than by virtue of his title; for it was laid down in *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (1) that, after the service of notice to treat, the owner of the land cannot deal with any of his land, either the land proposed to be taken, or the adjoining land, so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it. The principle is that all the rights of the parties and the quantum of compensation must be fixed and ascertained as at the date at which the notice to treat is given: see also *Ex parte Edwards* (2); *Tyson* v. *Mayor of London* (3); *Wilkins* v. *Mayor of Birmingham.* (4) The plaintiff is not entitled to recover compensation as the assignee of Blake: first, because his conveyance of August 17, 1901, to the plaintiff, rightly construed, does not include the compensation claimed by her; and, secondly, because, assuming that it does, that compensation cannot be assigned, at any rate so as to entitle the plaintiff to sue for and recover it in her own name. Blake cannot be added as a plaintiff at this stage of the proceedings, not having been a party to the proceedings before the compensation jury. The right to compensation is not a chose in action which is assignable under s. 25 of the Judicature Act. It has been held that a mere right of action for unliquidated damages for breach of contract is not a "legal chose in action" within the

(1) [1903] 1 K. B. 652; [1904] A. C. 461.
(2) (1871) L. R. 12 Eq. 389.
(3) (1871) L. R. 7 C. P. 18.
(4) (1883) 25 Ch. D. 78.

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meaning of that section: *May* v. *Lane* (1); *Torkington* v. *Magee* (2); still less is a right to recover unliquidated damages for a tort. The principle is that, though a contract is assignable in equity—see *Tolhurst* v. *Associated Portland Cement Manufacturers* (3)—an assignment of an accrued right of litigation is bad as contravening the law against maintenance and champerty: *Prosser* v. *Edmonds*. (4) The right of compensation for injurious affection is in substance analogous for this purpose to a right of action for damages for a tort, the proceedings for compensation merely being substituted by the statute as a more convenient machinery than an action. This is rendered clear by the consideration that there can be no compensation where, apart from the statute, an action of tort would not have been maintainable: see *In re Penny* (5); *Caledonian Railway* v. *Ogilvy* (6); *London, Brighton and South Coast Ry. Co.* v. *Truman*. (7) Even assuming that the plaintiff can recover compensation in her own name as the assignee of Blake, it is contrary to the principle of *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (8) that she should be allowed to recover compensation in respect of the head of damage "trade stock, &c." Blake could not have recovered such damage, and a greater burden in respect of compensation could not be laid on the company by dealings with the land subsequent to the notice to treat.

With regard to the Berry and Vickery leaseholds, on the same grounds as in the case of the freeholds, the plaintiff cannot recover the compensation claimed. Her title is based upon an assignment to her of the rights of Berry and Vickery to compensation, which it is contended could not by law be assigned. In the case of these leaseholds there was no property taken, and no notice to treat; so the analogy to damages for tort is stronger even than in the case of the freeholds.

With regard to the Hewitt leaseholds, the assessment

(1) (1894) 64 L. J. (Q.B.) 236.
(2) [1902] 2 K. B. 427; [1903] 1 K. B. 644.
(3) [1903] A. C. 414.
(4) (1835) 1 Y. & C. Ex. 481; 41 R. R. 322.
(5) (1857) 7 E. & B. 660.
(6) (1856) 2 Macq. 229.
(7) (1885) 11 App. Cas. 45.
(8) [1903] 1 K. B. 652; [1904] A. C. 461.

included damages in respect of damage to trade stock upon portions of the leaseholds in which the plaintiff had no interest, and is therefore bad in toto. There was no assignment of the interests of the other tenants; so the plaintiff cannot recover as assignee. The Court has no power to apportion the compensation or to order a new trial of the issue for that purpose: see *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1)

Sir Edward Clarke, K.C., in reply. As to the freeholds, the plaintiff's interest was continuous, though it was altered from that of a leaseholder to that of a freeholder. Any additional interest that she acquired by the change in respect of compensation was expressly excluded from the settlement between Blake and the company. As to the Berry and Vickery leaseholds, the claim for damage to trade stock has been abandoned, and the only question that remains is the technical one whether the assignors ought to have proceeded in their own names as trustees for the plaintiff. It is agreed that the structural damage was done and that the assignment was subsequent. It is a sufficient answer to say that a Court of Equity would have allowed the plaintiff to use Berry's and Vickery's names. No question of maintenance could arise, for the plaintiff had to repair the premises, and had a direct interest in the subject-matter of the litigation.

As to the Hewitt leaseholds, the plaintiff only recovered the damage that her premises had sustained; but even if the case were otherwise, the point that the interests of other persons might be included in the sum assessed was not raised either in the pleadings or at the trial, and, that being so, it ought not to be allowed to invalidate the whole proceedings.

George Cave, K.C., in reply, on the cross-appeal.

Cur. adv. vult.

1904. Dec. 9. The judgment of the Court (Collins M.R., Stirling L.J., and Mathew L.J.) was read by

STIRLING L.J. This case comes before this Court upon an appeal and cross-appeal from the judgment of Wright J., in an

(1) (1889) 22 Q. B. D. 435.

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action brought to recover a sum of 4150*l.* awarded to the plaintiff upon an inquiry held before Ridley J. and a jury under the provisions of the Regulation of Railways Act, 1868, s. 41, as the compensation to be paid by the defendants to the plaintiff for subsoil taken, and in respect of "structural damage" and "damage to trade stock" occasioned to the plaintiff, in respect of certain houses and buildings in and near the City Road, as the result of subsidence caused by the construction by the defendants of a tunnel for an underground railway under the authority of an Act of Parliament. These houses and buildings comprised, first, certain freehold houses, Nos. 119 to 125 (odd numbers), City Road, and Nos. 1 to 5 (odd numbers), East Street, hereafter referred to as the freeholds; secondly, certain leasehold houses, Nos. 127 to 133 (odd numbers), City Road, and Nos. 7 to 13 (odd numbers), East Street, hereafter referred to as the Hewitt leaseholds; and, thirdly, certain other leasehold houses, Nos. 135 to 139 (odd numbers), City Road, hereafter referred to as the Berry and Vickery leaseholds. On these premises the plaintiff has for some time past carried on the business of a general draper. The defendants' works were executed between the beginning of April, 1901, and the end of October, 1901. The structural damage, which is admitted to have resulted from the execution of the defendants' works, occurred between the beginning of April, 1901, and December 31, 1901. Upon the inquiry above mentioned the jury found that the value of the subsoil taken was 50*l.*, and that of "damage to trade stock" was 2100*l.*, and of "structural damage" 2000*l.* It was agreed between the parties that one-third of each of these last-mentioned sums was to be treated as attributable to the freeholds, one-third to the Hewitt leaseholds, and one-third to the Berry and Vickery leaseholds. At the trial before Wright J. the plaintiff's claim to the 50*l.* in respect of subsoil taken was abandoned, and the defendants contended that the plaintiff ought not to recover any part of the 2100*l.* or the 2000*l.* Wright J. held that the plaintiff was not entitled to recover any portion of these sums so far as they were attributable to the freeholds or the Berry and Vickery leaseholds, but was entitled to recover one-third of each of

these sums in respect of the Hewitt leaseholds. The plaintiff has appealed from this judgment, and insists that the decision as to the freeholds ought to be reversed and the claim allowed to the full extent; and that the decision as to the Berry and Vickery leaseholds ought also to be reversed, but only so far as relates to the claim for "structural damage," nothing being now claimed in respect of "damage to trade stock." There is a cross-appeal by the defendants, who insist that the decision as to the Hewitt leaseholds ought to be reversed. Somewhat different considerations apply to these three different properties, and it is proposed to deal with them separately in the following order—first, the freeholds; secondly, the Berry and Vickery leaseholds; and, thirdly, the Hewitt leaseholds.

First, as to the freeholds. These were in March, 1899, vested in one Arthur Maurice Blake in fee simple, subject to a lease vested in the plaintiff for a term of years to expire at Christmas, 1899. On March 24, 1899, the defendants served upon Blake a notice to treat for an easement or right of using the subsoil or under-surface of the premises and as to the compensation to be made for damage (if any) sustained by the execution of the company's works. On July 3, 1899, they served on the plaintiff a like notice to treat, but without prejudice to the question whether the plaintiff had any interest in the subsoil. In October, 1899, Blake agreed to grant to the plaintiff a new lease for twenty-one years from Christmas, 1899. On February 6, 1900, an agreement was come to between Blake and the defendants whereby Blake agreed to grant and the defendants to purchase for 850*l.*—to include satisfaction and compensation for all damage (whether permanent, temporary, or recurring), loss, or inconvenience occasioned in respect of the lands and premises the subject of the agreement, except for structural damage through drainage or subsidence caused by the works of the company—full right and liberty to maintain and use a tunnel in and through the portion of the grantor's property thereby defined, including the freeholds. On March 26, 1901, Blake entered into an agreement for the sale of the freeholds to the plaintiff; and by an indenture dated August 17, 1901, the freeholds were in

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pursuance of this agreement conveyed by Blake to the plaintiff. The plaintiff's claim in respect of the freeholds is as owner thereof in fee. Wright J. held that, by virtue of the decisions collected in *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (1), the plaintiff, whether the case depended on the notice to treat which was served on her in July, 1899, or her notice of claim under s. 68 of the Lands Clauses Consolidation Act, 1845, was not entitled to compensation for damage except in respect of her interest in the residue of the old lease, which still subsisted at the date of the notice to treat, and in respect of that interest she suffered no damage. It was argued before us that the plaintiff claiming under s. 68 was in no way bound either by the notice to treat given to Blake or by that given to herself; and it was said she might have maintained a claim for compensation merely as occupier of the property. The actual claim of the plaintiff was made by her, however, not as occupier, but (as already remarked) as owner in fee, and that under a title derived from Blake subsequently to the notice to treat served on him. Although the property in respect of which the claim to compensation was made was not proposed to be taken by the company, but merely adjoining property of the same landowner, it was held by the Court of Appeal and the House of Lords, in the case of *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (1), that the proprietor could not disregard the obligations imposed upon him by the notice to treat in respect of land which might be injuriously affected any more than in respect of land required to be taken. Lord Lindley, in advising the House of Lords, says (2): "The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat to deal with any of his land either taken or injuriously affected by the company, so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it." This principle, in our opinion, applies to the present case. The landowner, however, is only precluded from dealing with his property in such a way as to subject the company which has given the

(1) [1903] 1 K. B. 652; [1904] A. C. 461. (2) [1904] A. C. 461, at p. 465.

notice to a greater burden in respect of compensation for damage occasioned by their works. So long as he does not infringe this rule he may, as it seems to us, sell and convey his land to a purchaser; and the company cannot take advantage of such a conveyance to escape from any obligation on their part subsisting at the time of the conveyance in respect of the lands conveyed. Now, the conveyance to the plaintiff of August 17, 1901, contains a recital of the agreement of February 6, 1900, made between Blake and the defendants, and also a recital as follows: "And whereas no conveyance has yet been made to the Great Northern and City Railway Company of the easement agreed to be granted by the hereinbefore recited agreement of the 6th day of February, 1900 . . . . and it has been agreed that the said A. M. Blake should receive the said purchase-money provided by the said agreement, but that the said E. W. Dawson should have the benefit of all other rights, benefits, and advantages in respect of the premises hereinafter described and expressed to be hereby conveyed conferred on the said A. M. Blake by the said agreement." By the first witnessing part Blake conveys to the plaintiff the property in question, subject to the easement agreed to be granted to the defendants by the agreement of February 6, 1900; and by a second witnessing part he purports as beneficial owner to assign to the plaintiff "all the rights, benefits, and advantages of him, the said A. M. Blake, conferred by or to be derived from the hereinbefore recited agreement of the 6th day of February, 1900, so far as the same relates to the hereditaments and premises hereinbefore described and intended to be hereby conveyed, or any part thereof," save and except the purchase-money of 850*l.* which Blake was to be entitled to receive. This clause is followed by an irrevocable appointment by Blake of the plaintiff as his attorney—"In his name or otherwise to commence and prosecute any action or other proceedings which may hereafter become necessary to enforce the said rights, benefits, or advantages, or any or either of them." It appears to us that the intention of this deed was to place the plaintiff precisely in the same position as regards the

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defendants with respect to the lands conveyed as was previously occupied by Blake, and in particular to transfer to the plaintiff the compensation for structural damage to the conveyed property through drainage or subsidence caused by the works of the defendants excepted from the compensation which, by the agreement of February 6, 1900, was to be included in the sum of 850*l.* received by Blake. It was said that this compensation was "a right, benefit, or advantage conferred by or to be derived from" the notice to treat, and not from the agreement in question; and it may be that the expressions "conferred by" and "to be derived from" are not very happily chosen; but if they do not include this compensation they are entirely meaningless. The words are wide enough to cover a right, benefit, or advantage preserved to or kept alive in favour of Blake by the agreement of February 6, 1900, and in our opinion they ought to be construed as including this right to compensation. It was, however, contended that this assignment was invalid, and much reliance was placed on the decision of this Court in *May* v. *Lane* (1), and particularly on a passage in the judgment of Rigby L.J., who, in discussing the meaning of the Judicature Act, 1873, s. 25, sub-s. 6, says: "A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. It does not include a right of action such as, for instance, a right to recover damages for breach of a contract or a legal right to recover damages arising out of an assault, for if the argument on behalf of the plaintiffs be correct, such a right would be assignable, and this sub-section of the Judicature Act would materially affect the law of champerty and maintenance." Although, as is laid down by Lord Macnaghten in advising the House of Lords in *Tolhurst* v. *Associated Portland Cement Manufacturers* (2), "It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee," yet a Court of Equity is as much bound as a Court of Common Law by the law relating to champerty and maintenance, and if an assignment of a chose in action is obnoxious to that law it is bad in equity

(1) 64 L. J. (Q.B.) 236. (2) [1903] A. C. 414, at p. 420.

no less than at law. An assignment of a mere right of litigation is bad: *Prosser* v. *Edmonds* (1); but an assignment of property is valid, even although that property may be incapable of being recovered without litigation: see *Dickinson* v. *Burrell.* (2) It was said in argument that the right which Blake purported to assign was simply a claim to damages for a wrongful act, and therefore incapable of assignment. With this contention we do not agree. It was, in our opinion, a right, arising directly under the notice to treat served by the defendants, to compensation for damage which might be done in the lawful exercise of powers conferred on them by the Legislature. The compensation was a sum to be ascertained in the way prescribed by the Legislature, and payment thereof by the defendants was imposed on them as one of the terms of the exercise of those powers. The payment may be regarded as the price payable for the exercise of the powers, and in our judgment was property. Even if the assignment be regarded apart from the conveyance of the lands and buildings comprised in the deed of August 17, 1901, it appears to us that it is good; but we think that great weight must be given to the circumstance that this assignment is incidental and subsidiary to that conveyance, and is part of a bonâ fide transaction the object of which was to transfer to the plaintiff the property of Blake with all the incidents which attached to it in his hands. Such a transaction seems to be very far removed from being a transfer of a mere right of litigation. This conclusion appears to be in accordance with the decision in *Williams* v. *Protheroe* (3), where it was held in the Exchequer Chamber that there was no champerty in an agreement containing provisions for the purpose of enabling the bonâ fide purchaser of an estate to recover for rent due or injuries done to it previously to the purchase. It was next objected that even if the assignment were valid the plaintiff had throughout proceeded in her own name, and not in that of Blake. So far as the present action is concerned this is pure matter of form, for the conveyance confers on the plaintiff an irrevocable power to sue in the

(1) 1 Y. & C. Ex. 481; 41 R. R. 322. (2) (1866) L. R. 1 Eq. 337.
(3) (1829) 5 Bing. 309; 30 R. R. 608.

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name of Blake, and any defect in the constitution of this action might be cured by adding him as a co-plaintiff. Further, the power is such as, in our opinion, to entitle the plaintiff to give receipts in the name of Blake for anything that may be recovered in the action, and in this way the defendants would be protected against any claim by him hereafter. But, as to the proceedings before Ridley J., the case is different; and it was strongly contended that the plaintiff, by carrying them on in her own name, has obtained an advantage to which she is not entitled, and has been able to impose on the defendants a burden greater than they would have borne if the proceedings had been conducted in the name of Blake. If this contention be well founded, a result would be arrived at entirely at variance with the principle established by the decision in *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (1) It is sought to be made out in this way: it is said that the compensation ought to be assessed in the same way as if Blake, on the expiry of the lease under which the property was held at the date of the notice to treat, had entered into possession, and remained in such possession down to the time when the compensation is assessed. Now the amount of compensation awarded in respect of this portion of the property consists of two sums—namely, 666*l.* 13*s.* 4*d.* in respect of what is termed "structural damage," and 700*l.* in respect of "damage to trade stock." The former sum we understand to be the amount which would have to be spent on the property in order to reinstate it in the condition in which it was before the defendants' works were executed; and we are unable to see that there ought to be any difference in this amount whether the property was in the occupation of Blake, or of the plaintiff, or whether the proceedings were taken in Blake's name or the plaintiff's. Further, it appears to us that every word of Ridley J.'s summing-up, so far as it deals with this part of the case, would have been just as applicable if Blake had been the plaintiff before him instead of Mrs. Dawson. We think, therefore, that so far as this item is concerned the defendants have not had any greater burden

(1) [1903] 1 K. B. 652; [1904] A. C. 461.

imposed on them than they would have had to bear if the proceedings had actually been taken in Blake's name. The second sum was awarded in respect of "damage to trade stock," and is the sum which it was estimated would be sufficient to recoup to the plaintiff loss occasioned to her by disturbance of her drapery business carried on upon the property, and by damage caused, or likely to be caused, to stock during the period occupied in the reinstatement of the buildings. The amount has been arrived at on the assumption that the plaintiff was the person in occupation of the property, and it is contended that it ought to have been ascertained on the basis that Blake was the occupier. In our opinion the plaintiff cannot, consistently with the principle of *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (1), recover a greater amount of compensation than Blake could have got. At the time when the notice to treat was given Blake was reversioner in fee expectant on the determination of the plaintiff's lease at Christmas, 1899. If the inquiry as to compensation had taken place immediately after the service of the notice to treat, and before the execution of the works, Blake would have been entitled to compensation (1.) for probable structural damage, and (2.) for probable loss arising from his being unable to let the property on advantageous terms while the works remained unexecuted and the actual structural damage remained unascertained. But this course was not adopted. Blake and the defendants came to terms as to everything except the compensation for structural damage through drainage or subsidence caused by the defendants' works. The reason for this exception was obviously that both parties considered it for their advantage to postpone the inquiry as to compensation until the works were completed and their effect on the property ascertained, and thus avoid a difficult and highly speculative inquiry. It was implied in this agreement between them that upon this inquiry regard should be had to the facts which actually occurred. This being so, we have to consider the position of Blake when the plaintiff's lease expired. He did not proceed to enter into possession himself or to carry

(1) [1903] 1 K. B. 652; [1904] A. C. 461.

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on a drapery business there, but granted a new lease to the plaintiff. There is nothing to shew that the terms of the new lease were disadvantageous to him, or that he suffered any loss by his being unable to obtain better terms; and, even if there were, the compensation actually awarded by the jury has not been ascertained on this basis, but with reference to the loss occasioned to the plaintiff by disturbance of her business. It seems to us that, in these circumstances, Blake could not recover any damage under the head of "damage to trade stock," and, for the reasons already given, neither can the plaintiff. For these reasons we think that the appeal ought to be allowed so far as relates to the freeholds to the extent of 666*l.* 13*s.* 4*d.* awarded in respect of structural damage. We do not consider that on this part of the case we are differing from Wright J. on any question of law, for, as we read his judgment, he would have allowed this claim if he had been of opinion (as he apparently was not) that the conveyance of August 17, 1901, had contained an assignment to the plaintiff of Blake's right to compensation.

Secondly, as to the Berry and Vickery leaseholds. These were acquired by the plaintiff by purchasing from Berry and Vickery terms of eighty years, commencing on March 21, 1879, and consequently having in 1901 about forty-eight years to run. In each case the assignment of the term was accompanied by a document of even date, expressed to be made in pursuance of the contract for sale, whereby the assignor of the leasehold interest assigned to the plaintiff all rights of compensation in respect of structural damage caused by reason of the execution of the defendants' works. No notice to treat was served on any one in relation to the premises so assigned, and the plaintiff's claim was founded on the assignments to her by Berry and Vickery of their rights to compensation. Notices of these assignments were served on the defendants by the plaintiff. Wright J. held that, inasmuch as the claim of the plaintiff was founded on s. 68 of the Lands Clauses Consolidation Act, 1845, and not on any notice to treat, it was in the nature of a claim for damages for a wrong, and not a legal chose in action within the meaning of s. 25 of the Judicature Act, 1873. Upon this

appeal the plaintiff contends that this decision ought to be reversed, so far as relates to the sum of 666*l.* 13*s.* 4*d.* awarded by the jury as the compensation for structural damage, no claim being now put forward by her to the sum awarded in respect of "damage to trade stock." With the greatest respect, we are unable to adopt the view taken by Wright J. of this part of the case. In the first place, we think that the claim of the plaintiff is not in the nature of damages for a wrong. No action could be brought against the defendants in respect of any act done by them in exercise of their statutory powers: see *Hammersmith and City Ry. Co.* v. *Brand.* (1) For the reasons already stated, we think that the claim was in substance for the price payable by the defendants for the exercise of the legal right conferred on them by statute. To this price Berry and Vickery were legally entitled, and in our judgment no objection can be taken to the assignments of their rights as on the ground of maintenance or champerty for the reasons already stated with reference to the assignment by Blake of a similar right. Therefore these assignments would have been valid in equity if made prior to the Judicature Act, 1873; and the compensation assigned is, in our opinion, a legal chose in action within the meaning of s. 25, sub-s. 6, of that Act. We think, therefore, that, as to this part of the claim, the appeal ought to be allowed.

Thirdly, as to the Hewitt leaseholds. In March, 1899, these were vested in Hewitt for terms expiring at Midsummer, 1971, subject to underleases of parts thereof for terms expiring at Christmas, 1913, which underleases were vested in the plaintiff. On June 27, 1899, notice to treat in the form before mentioned was served on Hewitt, and on July 3 a similar notice to treat on the plaintiff. On January 10, 1900, the plaintiff sent to the defendants a claim which stated accurately the plaintiff's interest at that date in these leaseholds, and shewed that such interest extended only to part of them. The portions of these leaseholds not underlet to the plaintiff were held also by underlease, partly by the Fancy Box Company and partly by one Boucher; and the plaintiff purchased their interests in the

(1) (1869) L. R. 4 H. L. 171.

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course of 1901. On December 31, 1901, the plaintiff surrendered to Hewitt all the interests then vested in her, and took from him new underleases comprising the whole of these leaseholds for terms expiring at Michaelmas, 1936. Upon the settlement of the issues directed to be tried under the provisions of the Regulation of Railways Act, 1868, the interest of the plaintiff in these leaseholds was described as an interest in the whole of the leaseholds for a term of thirty-five years from Michaelmas, 1901, and compensation was awarded by the jury on this basis. Wright J. held that, as the plaintiff had at the date of the notice to treat an interest in these leaseholds under the surrendered sub-leases which had still thirteen years to run, and as she had a vested right to compensation at the time when she accepted the new underleases from Hewitt, she was entitled to maintain the action and to receive the whole of the compensation awarded in respect of these leaseholds. The legal principles on which the learned judge acted were not disputed before us, but it is pointed out that he apparently overlooked the fact that the surrendered underleases did not comprise the whole of the Hewitt leaseholds. The plaintiff has no assignment either from the Fancy Box Company or Boucher of any right to compensation vested in either of them, and it is pointed out that, even if such assignments had been made, they would not justify the plaintiff in claiming anything more than the Box Company and Boucher in respect of the trades carried on by them, which were different from those carried on by the plaintiff. The inquiry before Ridley J. and the jury under the Regulation of Railways Act was governed by the issues directed to be tried, and these were framed upon the assumption that the plaintiff was entitled to a term in the whole of the leaseholds—an assumption which the judge and jury (who are simply substituted for the sheriff and jury, the tribunal prescribed by the Lands Clauses Consolidation Act) were bound to accept as correct: *Reg.* v. *London and North Western Ry. Co.* (1) This being so, it seems to us that (as Ridley J. held at the trial before him) the defendants were entitled to raise in this action the objection that the plaintiff had not shewn title to the whole

(1) (1854) 3 E. & B. 443.

of the compensation awarded: see *Brierley Hill Local Board* v. *Pearsall*. (1) It is said, however, that the objection was not taken either in the pleadings or at the trial before Wright J. The defence does state, in paragraph 7 (B) and (C), the fact that, at the date of the notice to treat, the plaintiff held subleases of part only of these leaseholds. Paragraph 11 states the acquisition subsequently to the notice to treat of title by the plaintiff to the freeholds, and Hewitt, Berry, and Vickery leaseholds, and in particular the surrender by the plaintiff to Hewitt on December 31, 1901, of her underleases, and the granting of new leases. Paragraph 13 submits that, in the circumstances before mentioned, the plaintiff is not entitled to any compensation in respect of the freehold and Berry leaseholds. Paragraph 13 appears to be intended, according to its natural construction, to raise the objection, based on the case of *Mercer* v. *Liverpool, St. Helen's and South Lancashire Ry. Co.* (2), that the title of these properties was acquired by the plaintiff after, and therefore subject to, the notice to treat, but not explicitly to raise the objection relied on in this Court. Further, it would seem from the shorthand writer's notes of the argument before Wright J. that the objection then brought forward and argued was that based on *Mercer's Case* (2), and that the point raised in this Court was not really put before that learned judge. In these circumstances we think that the defendants ought not now to be allowed to raise it except on the terms of consenting to a proper apportionment being made of the sum awarded in respect of compensation. If the parties are willing that the deduction (if any) proper to be made from the compensation awarded by the jury in respect of the Hewitt leaseholds, by reason of part of those leaseholds being in the occupation of the Fancy Box Company and Boucher and not of the plaintiff, should be ascertained by agreement between themselves, or by a referee, we should be prepared to postpone for a reasonable time giving final judgment in this appeal until after the amount of this deduction is ascertained, it being impossible in the meantime to deal finally with the judgment of the Court below.

(1) (1884) 9 App. Cas. 595. (2) [1903] 1 K. B. 652; [1904] A. C. 461.

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[No agreement was come to as to the compensation awarded by the jury in respect of the Hewitt leaseholds; and on December 20 the Court gave final judgment, allowing the appeal and dismissing the cross-appeal.]

Appeal allowed in part; cross-appeal dismissed.

Solicitor for plaintiff: *Julius A. White.*
Solicitors for defendants: *Le Brasseur & Oakley.*

A. M.

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Dec. 16, 19.

[IN THE COURT OF APPEAL.]

In re FLEW. *Ex parte* FLEW.

Bankruptcy—Scheme of Arrangement—Approval by Court—Security for Composition—Sufficiency—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-s.* 9.

Though the Court will generally be reluctant to refuse to approve of a proposed scheme of arrangement by a debtor with his creditors which has been approved by the creditors, yet it is the duty of the Court, under s. 3, sub-s. 9, of the Bankruptcy Act, 1890, to consider whether the scheme is for the benefit of the creditors, and in particular whether it provides reasonable security for the payment of 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate, and to refuse to give the approval of the Court if it is not satisfied on these points.

A proposed scheme of arrangement with creditors (which had been approved by the creditors by the proper majority) provided (inter alia) that the property of the debtors, which would have been divisible among their creditors if they were bankrupt, should vest in a trustee and should be administered by him as in bankruptcy. The trustee was, on the approval of the scheme by the Court, to pay in full all fees, costs, and expenses, including the remuneration of the trustee, and all preferential debts, and was then to pay to all the unsecured creditors, in respect of all debts provable under the receiving order, and in satisfaction of the same, a composition of 20*s.* in the pound, payable in instalments of not less than 2*s.* 6*d.* in the pound, as and when the realization of the debtors' assets would allow. The payment of the preferential debts, fees, &c., and of the composition was to be secured by the vesting of the debtors' property in the trustee:—

Held, that the scheme did not within the meaning of s. 3, sub-s. 9, provide "reasonable security" for the payment of a composition of 7*s.* 6*d.*

in the pound, and that the scheme ought not to be approved by the Court.

Semble, that, notwithstanding the decision in *In re Pilling*, [1903] 2 K. B. 50, there may be cases in which the Court might approve of a scheme which provided for the conditional withdrawal by some creditors of their claims.

When the Court refuses to approve of a scheme of arrangement with creditors proposed by a debtor, an immediate adjudication of bankruptcy against him will be made only in the most exceptional circumstances.

APPEAL from the refusal of one of the registrars to approve of a scheme of arrangement by debtors with their creditors.

The debtors were F. R. Flew and J. P. Flew, who carried on business as builders. A receiving order was made against them on July 15, 1904, on the petition of a creditor. At the adjourned meeting of the creditors held on August 23, 1904, a resolution was passed by the proper majority accepting a scheme of arrangement proposed by the debtors. The scheme was as follows:—

"1. That the property of the debtors which would become divisible amongst their creditors, if they were adjudged bankrupt under these proceedings, shall vest in the trustee hereinafter mentioned, and that such trustee shall administer the aforesaid property in the like manner and with the like powers and duties and subject to the like conditions in all respects as though the debtors had been adjudged bankrupt, and such trustee aforesaid had been appointed trustee in the bankruptcy.

"2. To pay in full, forthwith on the approval by the Court of this scheme, all Board of Trade and Court fees then due, including the fees and expenses of the official receiver.

"3. To pay in full, forthwith on the approval by the Court of this scheme, all preferential debts directed by the Bankruptcy Act, 1883, and the Preferential Payments in Bankruptcy Act, 1888, to be paid in priority to other debts, and also all proper fees, costs, charges, and expenses of and incidental to the proceedings under the bankruptcy petition and of and incidental to this arrangement, including the costs, charges, and expenses, and the remuneration of the trustee for his services.

"4. To pay to all their unsecured creditors in respect of all

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debts provable under the receiving order made against the debtors, and in full satisfaction and discharge of the same, a composition of 20*s.* in the pound, payable in instalments of not less than 2*s.* 6*d.* in the pound, as and when the realization of the debtors' assets will allow.

"5. The payment of the aforesaid preferential debts, fees, costs, charges, and expenses, and of the said composition to be secured by the vesting of the property of the debtors in a person to be appointed by the creditors as trustee, subject to and in terms of clause 1 of this scheme.

"6. That on the approval by the Court of this scheme of arrangement the receiving order be discharged (and the order of adjudication annulled)."

By clause 7 five persons therein named were to be appointed a committee of inspection.

"8. That in consideration of this scheme and upon approval thereof by the Court, and only in such case, the mortgagees, (under specified mortgages of property belonging to the debtors), agree not to foreclose for a period of twelve months from the date of such approval, provided the same is obtained on or before October 31, 1904, and, in the event of the above-named trustee realizing or attempting to realize the said properties, to assist him so far as they can to realize the same as far as possible in the interests of the unsecured creditors, subject nevertheless to the payment in full to the mortgagees of all moneys owing under their security.

"9. That upon the approval by the Court of this scheme, and only in such case, family creditors having claims amounting to 820*l.*, whilst reserving their rights to prove and vote at the meetings of creditors or upon this scheme, are prepared to postpone their claims to dividend until all other unsecured creditors have received 20*s.* in the pound."

The public examination of the debtors was concluded on September 13, 1904.

The official receiver by his report dated October 20, 1904, reported that, according to the debtors' joint statement of affairs (submitted on August 1, 1904), the joint liabilities to rank for dividend amounted to 5369*l.* 1*s.* Proofs of debts had

already been made by sixty-nine joint creditors for sums amounting together to 5281*l.* 17*s.*, and there were several joint liabilities returned in the statement of affairs as expected to rank in respect of which no proof had yet been made. Exclusive of one (for 500*l.*), which was now said to be fully secured, the total ranking joint indebtedness would, so far as the official receiver could estimate, amount to about 5391*l.* 4*s.* 8*d.* This estimate was, however, formed on the assumption that none of the creditors regarded by the debtors as fully secured would seek to rank for dividend.

According to the debtors' joint statement of affairs there were no preferential debts, but claims of that character had been made, and, so far as the official receiver could judge, there were preferential debts amounting to 151*l.* 1*s.* 1*d.*

The joint assets, which were returned by the statement of affairs as estimated to produce 29,910*l.* 7*s.* 10*d.* consisted of book debts, estimated to produce 79*l.* 7*s.* 10*d.*, and equities of redemption of various properties, nearly all of which were blocks of flats which had been erected or were in course of erection by the debtors, and were estimated at 29,831*l.*

In the view of the official receiver there was no possibility of any such amount being realized.

Each of the debtors stated that he had neither separate estate nor separate unsecured liabilities.

With regard to the conduct and affairs of the debtors the official receiver reported:—

"That the debtors' assets are not of a value equal to 10*s.* in the pound on the amount of unsecured liabilities.

"That the debtors have omitted to keep such books of account as are usual and proper in the business carried on by them and as sufficiently disclose their business transactions and financial position within the three years immediately preceding their bankruptcy.

"That the debtors have brought on their failure by rash and hazardous speculations.

"And with regard to the debtors' proposal, that it cannot be regarded as reasonable or as providing the security required by s. 3, sub-s. 9, of the Bankruptcy Act, 1890, i.e., reasonable

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security for payment of not less that 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtors' estate."

The debtors' application for the approval of the scheme was supported by sixty-seven creditors, whose debts amounted to 5315*l.* 4*s.* 4*d.*, out of a total of seventy-eight creditors whose debts amounted to 5505*l.* 15*s.* 11*d.*

The registrar refused to approve of the scheme on the grounds—(1.) that the agreement of some creditors to stand by until a certain event as to certain debts had occurred and as to other debts to abstain from foreclosure for twelve months brought the case within the decision in *In re Pilling* (1); (2.) that the scheme was too speculative.

At the close of his judgment the registrar said: "What the creditors will risk or lose is sufficiently clear. The whole of the assets will be put out of the reach of the Court, while the debtors through their trustee continue to carry on a speculation very like the speculation which the official receiver has already described as 'rash and hazardous' and as contributing to bring about their bankruptcy."

The order refusing the approval of the Court stated that "the Court being satisfied that the case is not one in which the Court would be required, if the debtors were adjudged bankrupt, to refuse an order of discharge, and being satisfied that facts have been proved which would justify the Court in refusing, qualifying, or suspending an order of discharge, but that having regard to the nature of such facts and the Court being of opinion that such scheme of arrangement was too speculative and not reasonable or calculated to benefit the general body of their creditors," the application to approve the scheme was refused.

The debtors appealed. (2)

(1) [1903] 2 K. B. 50.

(2) By s. 3 of the Bankruptcy Act, 1890, sub-s. 8, "If the Court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required where the debtor is adjudged bankrupt to refuse his discharge, the Court shall refuse to approve the proposal."

Sub-s. 9: "If any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt,

Muir Mackenzie, for the debtors. This question turns upon s. 3, sub-s. 9, of the Bankruptcy Act, 1890, which makes the approval by the Court of a scheme falling under that sub-section conditional upon the scheme providing reasonable security for the payment of not less than 7*s.* 6*d.* in the pound on all the unsecured debts. "Reasonable security" does not mean security upon which it would be reasonable that a prudent man should invest money; the words are satisfied if there is a reasonable commercial probability that at least that sum will be realized: *In re Bottomley*. (1) There being here a reasonable commercial probability that there will be enough to pay the unsecured creditors a great deal more than 7*s.* 6*d.* in the pound, the learned registrar erred in rejecting the scheme.

[COZENS-HARDY L.J. Under this scheme the trustee could not disclaim onerous leases.]

It is submitted that he could. For this purpose the trustee is in the same position as if he were the trustee in a bankruptcy: Bankruptcy Act, 1890, s. 3, sub-ss. 16 and 17, and the Bankruptcy Act, 1883, s. 55. There being no reason of commercial morality why effect should not be given to this scheme, the Court ought not to refuse its sanction. Primâ facie, at any rate, the creditors themselves must be the best judges of what is for their benefit.

Carrington, for the creditors.

Sir R. B. Finlay, A.-G., and *S. G. Lushington*, for the official receiver, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must be dismissed. I base my judgment on one point and on one point only. [The Lord Justice read sub-s. 9 of s. 3 of the Bankruptcy Act, 1890, and continued:—]

In my judgment this scheme provides no such security as is there mentioned. In my opinion this scheme is a very speculative one indeed, and does not provide reasonable security

the Court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate."

(1) (1893) 10 Morr. 262, 273.

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FLEW, *In re.* FLEW. *Ex parte.*

Vaughan Williams L.J.

for the payment of even 7*s.* 6*d.* in the pound. I am aware that the learned registrar in his judgment said that, as the proposal is to pay 20*s.* in the pound, it may be that he had not to decide what is the meaning of "unsecured debts provable against a debtor's estate" in sub-s. 9. But, in my judgment, we are bound to consider, amongst other matters, what sort of security is afforded to the creditors. Generally speaking, and especially when there is an estate which may require a considerable expenditure of money in its realization, the Court would be reluctant to refuse to approve any scheme which had been passed by the creditors unanimously, or practically unanimously, because primâ facie the creditors are the persons most interested and best able to judge whether a scheme is or is not for their benefit. That is the course which the Court would generally adopt in such a case. But, as it seems to me, it is always open to the Court to consider whether the scheme is or is not for the benefit of the creditors, although, according to the general practice as I understand it, the Court is very reluctant to overrule the wishes of the creditors as regards an estate in the realization of which they and they alone are interested. The present case is obviously one to which, if the scheme had been for the payment of anything less than 20*s.* in the pound, sub-s. 9 of s. 3 of the Act of 1890 would necessarily have applied, and under these circumstances it seems to me that we ought to affirm the decision of the learned registrar and dismiss the appeal.

Some other points were discussed in the judgment of the learned registrar, e.g., the effect of the conditional withdrawal of the claims of certain persons, mortgagees, and "family creditors." It is, to say the least, not very easy to obtain the approval of a scheme when the debtor himself is party to a conditional arrangement of this kind. The decision in *In re Pilling* (1) no doubt makes it difficult to do so, though I do not say that in no such case would it be possible for the Court to approve the scheme if it thought there had been full disclosure of all the facts and all the negotiations for the scheme.

(1) [1903] 2 K. B. 50.

For the reasons therefore which I have already given I think this appeal should be dismissed.

ROMER L.J. I also think that this scheme (if it can be properly called a scheme) is one which the Court ought not to sanction. I say this for the reasons which have been given by my Lord, and also because I think there is a good deal of force in what the registrar said at the end of his very careful judgment, namely: "The whole of the assets will be put out of the reach of the Court, while the debtors through their trustee continue to carry on a speculation very like the speculation which the official receiver has already described as 'rash and hazardous' and as contributing to bring about their bankruptcy."

COZENS-HARDY L.J. I agree.

S. G. Lushington, for the official receiver, asked that an immediate adjudication of bankruptcy might be made against the debtors. The Court has power to do this under s. 20 of the Bankruptcy Act, 1883, and it was done in *In re Burr*. (1)

Muir Mackenzie, for the debtors. *In re Burr* (1) was a very exceptional case. In *In re Pilling* (2) this Court refused to make an immediate adjudication.

VAUGHAN WILLIAMS L.J. We think that such an order ought to be made only in the most exceptional circumstances.

Appeal dismissed.

Solicitors: *T. Blanco White; Solicitor to Board of Trade.*

(1) [1892] 2 Q. B. 467. (2) [1903] 2 K. B. 50.

W. L. C.

1904
Dec. 19.

WESTHORPE, Appellant *v.* POWLEY, Respondent.

Navy—Enlistment—Naval Service—Royal Naval Reserve—Penalty for making False Statements—Naval Enlistment Act, 1853 (16 *&* 17 *Vict. c.* 69), *s.* 16 *—Royal Naval Reserve* (*Volunteers*) *Act*, 1859 (22 *&* 23 *Vict. c.* 40).

Sect. 16 of the Naval Enlistment Act, 1853, which imposes a penalty on a person who on offering himself to enter the naval service of the Crown makes a false statement with intent to deceive any person "authorized to enter or enlist seamen or others in or for such naval service," has no application to a person who makes a false statement when seeking to enter the Royal Naval Reserve as established by the Royal Naval Reserve (Volunteers) Act, 1859.

Case stated by justices.

The respondent was charged on information with making, on February 23, 1904, a false statement in writing on offering himself to enter the naval service of His Majesty, contrary to the Naval Enlistment Act, 1853, s. 16.

The following facts were proved or admitted:—

The appellant was an officer in His Majesty's Customs, and was authorized by virtue of his appointment under the regulations hereinafter mentioned to enrol duly qualified applicants in the Royal Naval Reserve. The Royal Naval Reserve was established by the Royal Naval Reserve (Volunteers) Act, 1859, and is governed by regulations issued under that statute.

On February 23, 1904, the respondent applied in person to the appellant to be enrolled in the Royal Naval Reserve, and signed a printed form, which was read over to him and which contained the statements—(*a*) that the respondent had not already made application to be enrolled in the Royal Naval Reserve at that or any other port, and (*b*) that his age was thirty—both of which statements were false.

On behalf of the respondent it was contended upon the above facts that, as at the date of the passing of the Naval Enlistment Act, 1853, which created the offence, there was no force

of naval reserve in existence, s. 16 of that statute could not apply; and it was further contended that the expression in that statute, "naval service of Her Majesty," referred only to the Royal Navy, and had no application to the Royal Naval Reserve, on the ground that the Royal Naval Reserve was not at the date of the passing of that Act, and is not now, part of the naval service.

For the appellant it was contended that, inasmuch as the Royal Naval Reserve is under the control of and paid by the Admiralty, and its members when under training are under the command of His Majesty's naval officers, the force must come within the description "naval service," and that those words when used in the earlier Act must be taken to mean the naval force of the Crown as constituted for the time being.

The justices held that s. 16 of the Naval Enlistment Act, 1853, did not apply to persons applying to enter the Royal Naval Reserve and dismissed the information, but stated this case for the opinion of the Court. (1)

William Wills, for the appellant. The justices were wrong. The words "naval service" in the Naval Enlistment Act, 1853, must be given a wider meaning, and although the naval reserve was not then in existence, must be taken to apply to that force when it was constituted by the Royal Naval Reserve (Volunteers) Act, 1859. The preamble of the Naval Enlistment Act, 1853, speaks of the expediency of amending the law "concerning the manning and discipline of the navy," and s. 16 refers to "the naval service of Her Majesty"; but s. 18 makes provision in regard to men "belonging to any naval local volunteers," thus recognising the existence of naval service outside the navy; and the Act of the same year (the Naval

(1) By the Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69), s. 16, "Every person who, upon entering or offering himself to enter the naval service of Her Majesty, shall make or give any false statement, whether orally or in writing, with intent to deceive any officer or person authorized to enter or enlist seamen or others in or for such naval service, shall be deemed a rogue and vagabond . . . . and shall upon conviction thereof be punished accordingly. . . . ."

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Volunteer Act, 1853 (16 & 17 Vict. c. 73)), which established a body of naval local volunteers and provided for the temporary transfer to the navy in case of need of seafaring men employed in other public services, contains no provision for punishing men making false statements. This shews that the Legislature considered the provision in this behalf contained in s. 16 of the Naval Enlistment Act, 1853, to be sufficient.

The Royal Naval Reserve was established by the Royal Naval Reserve (Volunteers) Act, 1859, which contains no provisions in regard to false statements by persons entering it, and, as it is of the greatest importance that the persons entering the Royal Naval Reserve should not make untrue statements, it would seem that the Legislature again considered that the provisions of s. 16 of the earlier Act were applicable. By s. 16 of the Act of 1859 provision is made for punishing a person entering or attempting to enter the reserve as a new volunteer more than once during the same period of service—an offence which would not be covered by the earlier Act; and it seems probable that if the offence of making false statements had not been covered by that Act a special provision in regard to it would have been inserted.

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. I have come to the conclusion the decision of the magistrates in this case was right. The respondent was summoned under s. 16 of the Naval Enlistment Act, 1853, which provides that "Any person who upon entering or offering himself to enter the naval service of Her Majesty shall make or give any false statement . . . . with intent to deceive any officer," shall be liable to punishment. The proposition that nothing could be naval service of His Majesty within the meaning of this section which was not naval service of His Majesty at the time of the passing of the Act, and that therefore the section could not apply, goes too far. It is quite possible that subsequent legislation, and possibly even an Order in Council, might make the naval volunteers or naval reserve part of the naval service of His Majesty. I myself am pressed with the fact that Parliament

was passing an Act for the establishment of naval coast volunteers in the same year, 1853; and Mr. Wills was obliged to contend that if a person joining that body of naval volunteers under that Act had made a misstatement he would have been liable to penalties under s. 16 of the Naval Enlistment Act of the same year. I cannot take that view. The Naval Volunteer Act, 1853, did apply, by s. 15, all the law applicable to the navy during the time that the volunteers were serving; but, inasmuch as we are dealing with a criminal offence, it would be extremely difficult to argue successfully that s. 16 of the Naval Enlistment Act applied to the force of volunteers which was created or established under the Act passed in the same session on the ground that both sailors and volunteers were to be regarded as part of the naval service of the Crown for the purpose of that section. When the Act of 1859, under which a force of naval volunteers to be called the Royal Naval Reserve was created, comes to be considered, s. 1 speaks of its being a voluntary entry by seafaring men, and ss. 16, 17, and 18 all enact that persons entering may be subjected to penalties. Sect. 16, indeed, does to a certain extent touch this very subject-matter, because it imposed a penalty upon a person entering or attempting to enter as a new volunteer more than once during the same period of service. In that Act also we have a repetition that all the laws and customs for the time being in force shall be applicable to the volunteers during such period as they shall be on board a ship for the purpose of training, instruction, and exercise. As we have to construe the words "naval service," and as the section in question is a criminal section, I think we must be satisfied that, in the absence of express enactment, there is a necessary implication that the purview of s. 16 of the Naval Enlistment Act, 1853, extends to a volunteer of the naval reserve. Without overlooking that which has been properly urged as to the importance of there being regulations and restrictions in this behalf, and quite feeling that regulations might be made which to a certain extent would prevent wrong persons from entering the Royal Naval Reserve, and which might even subject them to certain consequences if they

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made misstatements with intent to deceive, I am of opinion that we ought not to hold that the effect of s. 16 of the Naval Enlistment Act, 1853, makes it a criminal offence to make a misstatement on entering or attempting to enter the Royal Naval Reserve. I think, therefore, that the decision of the justices was right, and that this appeal must be dismissed.

KENNEDY J. I agree.

RIDLEY J. I agree.

Appeal dismissed.

Solicitor for appellant: *The Treasury Solicitor.*

A. P. P. K.

1904

Nov. 4.

STONE, APPELLANT; TYLER, RESPONDENT.

Weights and Measures—Weighing Machine—Fraudulent Use of Machine—Weighing Article sold with Paper Wrapper—Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), s. 26.

Sect. 26 of the Weights and Measures Act, 1878, enacts that "Where any fraud is wilfully committed in the using of any weight, measure, scale," &c., the person committing such fraud shall be liable to a fine.

The appellant, a grocer, made up a number of packages of sugar wrapped in paper, each package being weighed by him, or his servants, on his scales and weighing exactly one pound weight of combined sugar and paper. The scales were just and accurate and gave the weight of each package correctly. Subsequently the appellant supplied one of those packages to a purchaser who had asked for one pound of sugar. The sugar without the paper wrapper weighed three-quarters of an ounce less than one pound:—

Held, that, as there had been no fraudulent using or manipulation of the scales in the act of weighing, s. 26 did not apply, and the appellant could not be convicted of the offence specified therein.

CASE stated, under the Summary Jurisdiction Acts, by six justices of the peace for the county of Middlesex.

At a petty sessions holden at Brentford an information was preferred against the appellant by the respondent, charging that the appellant at Chiswick in the same county did unlawfully and wilfully commit a fraud in the use of a certain weighing

instrument contrary to s. 26 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49). (1)

Upon the hearing of the information the following material facts were proved or admitted:—

The appellant is a grocer carrying on business at Chiswick, and the respondent is an inspector of weights and measures for the county of Middlesex.

On a day named in the information the respondent went to the appellant's shop at Chiswick and purchased, amongst other things, one pound of loaf sugar. The respondent asked for one pound of loaf sugar and paid 2½*d.*, the price of it. The sugar was handed to the respondent wrapped in a paper bag or wrapper. The gross weight of the package, that is to say, the weight of the sugar and the paper bag or wrapper, was exactly one pound, and the sugar without the paper bag or wrapper weighed three-quarters of an ounce less than one pound. This package of sugar had been previously weighed by the appellant, or his servants, in the paper in which it was delivered to the purchaser in the scales used by the appellant, and the package was one of a number of similar one-pound packages of sugar in the shop that had been previously weighed in the same scales, and none of which packages weighed as much as one pound without including the paper in which they were wrapped.

The scales in which the sugar had been weighed with the wrapper were perfectly just and accurate, and gave the weight of the package correctly.

The respondent, when he asked for one pound of sugar, expected to get one pound weight of sugar without including the weight of the paper in which it was wrapped. The appellant knew, and the respondent did not know, that in fact the appellant was giving the respondent less than one pound weight of sugar, and, as the sugar was not weighed in the presence of the respondent, he had no means of knowing that

(1) Sect. 26: "Where any fraud is wilfully committed in the using of any weight measure scale balance steelyard or weighing machine, the person committing such fraud, and every person party to the fraud, shall be liable to a fine not exceeding five pounds. . . . ."

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he was being given less than one pound weight of sugar. The paper bag in which the sugar was weighed and afterwards handed to the respondent contained 35 per cent. of mineral matter and was unnecessarily heavy for the purpose of wrapping sugar. The pecuniary value of three-quarters of an ounce of sugar was shewn to be greater than the value of the paper bag.

The justices convicted the appellant, and inflicted upon him a penalty of forty shillings and costs.

The question for the opinion of the Court was whether they were right in law in convicting the appellant of the offence charged.

Asquith, K.C. (*Avory*, K.C., and *H. D. Bonsey* with him), for the appellant. The conviction was wrong. Whatever remedy there might otherwise be, no offence was committed within s. 26 of the Weights and Measures Act, 1878. That section is one of a group headed "Unjust Weights and Measures"; s. 25 imposes a penalty upon persons using or having in their possession weights and measures which are in themselves unjust, and s. 26 is aimed at wilfully fraudulent acts or manipulation in the use of the weighing machine. The case finds that the machine was just and accurate and gave the weight of the package correctly. The sale to the respondent, therefore, had no connection with any fraudulent use or manipulation of the machine, and s. 26 has no application to the transaction.

Eustace Hills, for the respondent. On the facts stated there was fraud in the use of the machine, because it was used for the purpose of making up, as a package containing one pound weight of sugar, a package which in fact weighed only one pound of combined sugar and paper. The conviction was, therefore, right. [He referred to *Lane* v. *Rendall* (1); *London County Council* v. *Payne* (2); *King* v. *Spencer*. (3)]

Asquith, K.C., was not heard in reply.

LORD ALVERSTONE C.J. I confess that during the argument I have tried to find some ground upon which the conviction

(1) [1899] 2 Q. B. 673. (2) (1903) 2 L. G. R. 184.
(3) (1904) 2 L. G. R. 979.

could be supported, because this practice of weighing articles sold with the paper which incloses them undoubtedly causes injustice to purchasers. I agree that, if the Act of Parliament in question does not apply, there may be difficulty in respect of other proceedings; but, if that be so, the matter is one which must be dealt with by the Legislature; we are not justified in straining the language of the Act in order to provide a remedy. With respect to certain trades, however, the matter has been dealt with. The question we have to determine is whether or not this is a good conviction under s. 26 of the Weights and Measures Act, 1878. Sect. 26 follows upon a section dealing with the case of scales which are in themselves false or unjust, and applies to fraud wilfully committed in the use of scales. It points to some trick or manipulation in the course of weighing, not to an unfair sale of an article to the purchaser. Here there was no fraud, or step in the fraud, committed by weighing the sugar in a particular manner; the fault was in handing over the counter to a person who asked for one pound of sugar that which was one pound of sugar and paper. In order to constitute an offence under s. 26 there must, to my mind, be some fraud in connection with the use of the scale. If the scale be just, and if it be capable of weighing correctly, and does weigh correctly, that which is weighed, then no offence is committed under the section. I am, therefore, of opinion that the conviction was wrong, and should be quashed.

KENNEDY J. I have come to the same conclusion. Sect. 26 provides a penalty, "Where any fraud is wilfully committed in the using of any weight measure scale balance," &c. When the appellant, or his servant, in the recesses of his shop put upon his weighing machine a certain quantity of sugar and paper weighing together one pound as indicated by the weight put upon the other side, the machine did its part properly; it weighed correctly, and there was no fraud in the using of it. The wrong or mischief done was not in giving to the buyer a quantity which had been untruly weighed, but in selling to him as one pound of sugar that which was not one pound of sugar, but was one pound of sugar and paper combined. That

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is not, in my opinion, the offence aimed at by s. 26. The cases decided under s. 25 do not apply, and there is no decision which does apply to the point raised here.

RIDLEY J. I am of the same opinion, and have nothing to add.

Judgment for the appellant. Conviction quashed.

Solicitors for appellant: *Neve, Beck & Kirby.*
Solicitors for respondent: *Nicholson, Patterson & Freeland.*

W. A.

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1904

Dec. 14.

[IN THE COURT OF APPEAL.]

ROBINS *v.* GODDARD.

Building Contract — Construction — Certificate of Architect — Finality — Reference of Disputes to Arbitration—Right to Legal Remedies.

In a building contract an architect was nominated, who was given a general control over the works, which were to be carried out in accordance with his directions and to his satisfaction. By a clause in the contract he was empowered to order the removal of improper materials, and the re-execution of work not done in accordance with the drawings and the specification. By another clause any defects which might appear within twelve months from the completion of the works, arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings and specification, were upon the written direction of the architect to be made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. A further clause, after providing for payment of the contractor under certificates issued by the architect, declared that "No certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this contract." The final clause provided that in case any dispute or difference should arise as to the construction of the contract, or any matter or thing arising therefrom, except certain specified things, notice thereof should forthwith be given, and such dispute or difference should be referred to arbitration, and the arbitrator should have power to open up, review, and revise any certificate, opinion, decision, requisition, or notice, save in regard to the matters expressly excepted, and to determine all matters in dispute of which notice should have been given.

In an action by the contractor against the building owner to recover

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sums due on certificates issued by the architect, the defendant set up by way of defence and counter-claim that the work done and materials supplied were defective and unsuitable, and not in accordance with the terms of the contract. At the trial the certificates were held to be conclusive, and judgment was given for the plaintiff. On appeal:—

Held, that the arbitration clause destroyed the finality of the certificates, and that consequently the defendant was entitled to set up the defence and counter-claim to the action:

Held, further, by Stirling L.J., that the provision that no certificate should be considered conclusive evidence as to the sufficiency of work or materials to which it referred was general, and that the clause could not be read as applying only to the liability of the contractor to make good defects.

Judgment of Farwell J., [1904] 2 Ch. 261, reversed.

APPEAL from the judgment of Farwell J., sitting as an additional judge of the King's Bench Division, reported [1904] 2 Ch. 261.

These were three actions between the plaintiff, a builder, and the defendant, a building owner, to recover three sums of money due to the plaintiff upon the certificates of an architect appointed under a building contract entered into between the plaintiff and the defendant.

The contract was contained in an agreement and schedule of conditions in a form sanctioned by the Royal Institute of British Architects in agreement with other bodies, and by the agreement the plaintiff, therein called the contractor, agreed with the defendant, therein called the employer, subject to the conditions in the schedule, to execute the works shewn upon certain drawings and described in a specification. By clause 3, the term "the architect" was to mean a certain named person, or in the event of his death such other person as should be nominated by the employer and not objected to by the contractor. By clause 5 the conditions were to be read as forming part of the agreement.

The following clauses appeared in the schedule of conditions of contract:—

"1. The works shall be carried out in accordance with the directions and to the reasonable satisfaction of the architect, in accordance with the signed drawings and specification, and in accordance with such further drawings, details, instructions, directions, and explanations as may from time to time be

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given by the architect. If the work shewn on any such further drawings or details, or necessary to comply with any such instructions, directions, or explanations, be, in the opinion of the contractor, extra to that comprised in the contract, he shall, before proceeding with such work, give notice in writing to this effect to the architect." The clause then provided that, in the event of the architect and the contractor failing to agree upon a matter of extras, the contractor was to carry out the work, and the question whether or not there was any extra, and if so the amount thereof, should, failing agreement, be settled by the arbitrator as provided in clause 32.

Clause 4 contained the following provision: "If the contractor find any discrepancy in the drawings, or between the drawings and specification, he shall immediately refer the same to the architect, who shall decide which shall be followed."

Clause 5 provided that the contractor was to conform to the regulations of any Acts of Parliament relating to the works and to the regulations of any local and other authorities, and was to give to the architect notice of the variations proposed to be made.

Clause 9 related to the dismissal of workmen by the contractor at the request of the architect.

Clause 12 provided that the contractor should, when authorized by the architect, or as provided by clause 5, vary by way of extra or omission from the drawings or specifications, the authorization to be proved by any writing or drawing signed by the architect, or by any subsequent written approval by him. No claim for an extra was to be allowed unless executed under the provisions of clause 5, or by the authority of the architect. Any such extra was thereinafter referred to as an authorized extra.

Clause 13 provided for the price of authorized extras and omissions which were to be determined by the architect or a named surveyor.

Clause 16 related to the power of the architect to order the removal of materials not in the opinion of the architect in accordance with the specification or his instructions, and the re-execution of the work with proper materials.

Clause 17 related to defects which might appear within twelve months from the completion of the work, arising in the opinion of the architect from materials or workmanship not in accordance with the drawings or specification or his instructions, which the contractor was to make good at his own cost, unless the architect should decide that the contractor ought to be paid for the same.

Clause 19: "The contractor shall not, without the written consent of the architect, assign this agreement or sublet any portion of the works."

Clause 23 named a day for the completion of the works, except certain matters which in the opinion of the architect it might be desirable to delay.

Clause 24: "If the contractor fail to complete the works by the date named in clause 23, or within any extended time allowed by the architect under these presents, and the architect shall certify in writing that the works could reasonably have been completed by the said date or within the said extended time," the contractor was to pay a sum per week as liquidated damages.

Clause 25 related to delay arising in the opinion of the architect for any of certain specified causes, and provided that the architect should make a fair and reasonable extension of time for completion.

Clause 30, relating to certificates to be given by the architect, was as follows: "The contractor shall be entitled under the certificates to be issued by the architect to the contractor, and within fourteen days of the date of each certificate, to payment by the employer from time to time by instalments, when in the opinion of the architect work to the value of 100*l.* (or less at the reasonable discretion of the architect) has been executed in accordance with the contract, at the rate of 80 per cent. of the value of work so executed in the building, until the balance in hand amounts to the sum of 200*l.*, after which the instalments shall be up to the full value of the work subsequently executed. The contractor shall be entitled under the certificate to be issued by the architect to receive payment of 100*l.*, being a part of the said sum of 200*l.*, when the works are

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practically completed, and in like manner to payment of the balance within a further period of two months, or as soon after the expiration of such period of two months as the works shall have been finally completed, and all defects made good according to the true intent and meaning hereof, whichever shall last happen. The architect shall issue his certificates in accordance with this clause. No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from the liability to make good all defects as provided by this agreement. . . ."

Clause 32, relating to arbitration, was as follows: "Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor, either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder (except as to matters left to the sole discretion of the architect under clauses 4, 9, 16, and 19, and the exercise by him under clause 18 of the right to have any work opened up), or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of . . . . and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the question of certificate, shall not be opened until after the completion, or alleged completion, of the works, unless with the written consent of the employer or architect and the contractor. The arbitrator shall have power to open up, review, and revise any certificate, opinion, decision, requisition, or notice, save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition, or notice had been given." Upon such a reference the costs of the reference and award were to be in the discretion of the

arbitrator, and the submission was to be deemed a submission to arbitration within the meaning of the Arbitration Act, 1889.

To the claim of the plaintiff in the action the defendant pleaded by way of defence that the certificates were in respect of work done and materials supplied, not in accordance with the terms of the contract, but defective and unsuitable, and he counter-claimed upon the same ground.

At the trial the learned judge decided upon the construction of the contract that the certificates were final, and declined to entertain the counter-claim. Judgment was accordingly given for the plaintiff. (1)

The defendant appealed.

C. A. Russell, K.C., and *C. B. Marriott*, for the defendant. The scheme of the contract is that the certificate of the architect shall not generally be final and conclusive. There are certain cases in which the decision of the architect is to be treated as final against the contractor, but none in which the building owner is prevented from questioning a decision whether in the form of a certificate or not. Clause 30 in terms says that a certificate is not to be conclusive evidence as to the insufficiency of the work or materials to which it relates. To that provision is added another, that the certificate is not to relieve the contractor of liability to make good defects. These are separate provisions, and it requires the alteration in the wording of the clause suggested by the learned judge to make the clause apply exclusively to the liability of the contractor to make good defects. It is submitted that such an alteration is not warranted. An arbitration clause like clause 32 cannot oust the jurisdiction of the Court, and, subject to the named exceptions, embraces every dispute that can arise. The result is that, unless the matter is referred upon a proper application, the defendant is entitled to raise by his defence and counter-claim that the work and materials were not in accordance with the contract, and to have that issue tried in the action.

Duke, K.C., and *Beddall*, for the plaintiff. The effect of the contract is that the certificate of the architect is to be final

(1) [1904] 2 Ch. 261.

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unless and until it is appealed against under the arbitration clause. Clause 30 relates exclusively to the subject-matter there mentioned, namely, the sufficiency of work and materials—and as to that alone a certificate is not to be final, in order to enable the architect to insist on defects being made good under the provisions of clauses 16 and 17. In all other cases the certificates are final so long as the only mode of reviewing them by means of the arbitration clause is not adopted. A contrary view would give no effect to the certificates, and would render the arbitration clause nugatory; for if that view is taken the building owner, not merely when the building is going on, but years afterwards, might reopen any or every difference or dispute. It is submitted that this would not be a reasonable view to take of the contract, and that as the defendant has not taken proper steps to question the certificates the decision of the Court below was right.

COLLINS M.R. This is an appeal from the judgment of Farwell J. upon the construction to be placed on a building contract. The construction of building contracts has been a frequent subject of discussion in the Courts both before and after the time when it became the practice to use the general form of contract which is before us in this case. The point upon which the decision of the learned judge turned was whether the certificates given by the architect were conclusive, and the conclusion arrived at was that they were so. It is remarkable that the only reference made in the judgment to the arbitration clause of the contract was in relation to the position of the architect as referee between the two parties: "This is not one of the matters which is referred to arbitration; or, if it be, it is not a matter which is before me at present. The point before me is this, that the counter-claim asks me to decide, either by myself or by the official referee, questions as to deficient workmanship and materials which are said to be not in accordance with the drawings and specification. Now that is a matter which is provided for by this particular seventeenth condition, and unless the architect has not only expressed his opinion that they are not in accordance

with the drawings and specification, but has also directed that the builder ought not to be paid for them, I do not see how there is anything before me on which I can possibly adjudicate in any way: I have, in fact, no jurisdiction. The result is that in my opinion there is no case on the counter-claim." The learned judge, for some reason that I do not understand, ignored the arbitration, and on that footing I can understand the contention being raised that the certificate of the architect was final. On the appeal the effect to be given to the arbitration clause is before us. The clause provides in substance that every dispute or difference, either during the progress of the works or after they have come to an end, as to the contract or any matter arising under it, with certain specified exceptions, is to be a subject-matter to be determined by some person other than the architect. That fact gets rid of any distinction between matters that, apart from the arbitration clause, might and matters that might not be finally determined by the architect. Under the clause the arbitrator has power to open up, review, and revise, among other things, any certificate, so that any certificate that is given can be reviewed. That negatives the contention that the defendant is debarred by the certificates of the architect from setting up bad workmanship on the building and the introduction of improper materials. The dispute submitted to the arbitrator is by the terms of the arbitration clause to be determined as if no certificate had been given. If something which purports to be conclusive is made subject to revision, it loses its quality of finality. That is the case here, where the decision of the architect is made subject to the decision of an arbitrator. A person who agrees to arbitrate upon any matter is not, unless the award of an arbitrator is made a condition precedent to the bringing of an action, debarred from pursuing his common law right to bring an action, subject to this—that upon proper steps being taken a direction might be obtained that the case, instead of being tried in an action, should go before the arbitrator. No order has been made in this case which excluded the defendant from his legal right to an action at common law, and there was, therefore, nothing to prevent the defendant from raising his

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defence and counter-claim, or to deprive the learned judge of jurisdiction to try them.

I am of opinion, therefore, that the appeal should be allowed.

STIRLING L.J. I also think that the appeal should be allowed. The question arises under a building contract, in carrying out which the plaintiff, who is a builder, executed certain works, and he now brings an action to recover the amount certified by the architect. The defendant, who is the building owner, replies by a defence and counter-claim, in which he alleges deficient workmanship and the use of materials not in accordance with the drawings and specification. The learned judge held on this state of things that he had no jurisdiction to entertain the defence and counter-claim. If that is so, it must arise from some provision of the contract between the parties which has the effect of excluding the jurisdiction of the High Court. I gather that the learned judge found that provision in a stipulation in clause 30 making the architect an authority whose decision is to be binding as to defects arising, in his opinion, from materials or workmanship not in accordance with the drawings and specifications or the instructions of the architect. The question is whether that is the correct construction of the clause. The contract provides by clause 1 that the work is to be carried out in accordance with the directions and to the reasonable satisfaction of the architect. Undoubtedly he has authority to give directions and explanations and to supply details, with all of which the contractor is bound to comply. The contract, however, shews on its face by s. 16 that it is contemplated that in spite of the vigilance of the architect mistakes may be made and work executed with materials or workmanship not in accordance with the drawings and specification or the instructions, and an order may be given for removal of improper materials from the works and for the re-execution of work improperly done. It is not suggested that any such order was given in this case, but I mention the matter to shew that it was in the contemplation of the parties that notwithstanding due care on the part of the architect

improper materials might be used, and to provide a remedy for that. Clause 17 provides a further remedy as to defects appearing after the completion of the works, and arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings and specifications or the instructions of the architect, for in that case the defects are to be amended and made good by the contractor at his own cost, unless the architect decides that he ought to be paid. What is there in the contract to make these remedies exclusive, so as to deprive the building owner of his remedy by an action for damages? I cannot find anything that can have that effect. Clause 30 deals with the payment of the contractor at the times and in the manner set out in the clause, and entitles the contractor, under certificates to be issued by the architect, to 80 per cent. of the value of the work done from time to time. It provides that "the architect shall issue his certificates in accordance with this clause. No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement." That therefore, as I read the contract, leaves the matter open. The learned judge prefers to read "nor shall it relieve the contractor" as if it ran "so as to relieve the contractor." Whatever the result might be, if the clause had been so framed I confess that, speaking for myself, I do not see any ground for putting that construction upon it. The two stipulations appear to me, according to the natural meaning of the language used, to be distinct, and consequently the clause does not support the view that the certificate of the architect is final. When we come to the arbitration clause the matter is free from doubt. The arbitrator is to have power (with certain exceptions not including the certificates in question) to open up, review, and revise, among other things, any certificate, and to treat the matter before him as if no certificate had been given. These certificates, therefore, were not intended to be absolutely binding and conclusive. No doubt on an application made at the proper time the dispute might have been referred to arbitration; but it has not been

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referred, and the matter remained open for decision under the ordinary jurisdiction of the Courts, and the defendant was entitled to his ordinary legal remedies and to have his case heard.

MATHEW L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Booth & Smee.*

Solicitors for defendant: *Goddard, Stanton & Hudson.*

A. M.

1904 *Nov.* 30.

1905 *Jan.* 11.

RISDON IRON AND LOCOMOTIVE WORKS *v.* FURNESS.

Company—Limited Liability—Company formed for purpose of Trading in Foreign Country—Personal Liability of Shareholders under the Foreign Law—Conflict of Laws.

An English company incorporated under the Joint Stock Companies Acts as a limited company was, as the memorandum of association stated, formed for the purpose of acquiring and working mines in (amongst other countries) the United States of America, and by the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California, and for the purposes of those mines purchased from the plaintiffs, manufacturers in California, certain machinery. By the law of California every shareholder of a company, whether incorporated in California or elsewhere, trading within that State is personally liable for such proportion of the company's debts as the amount of his shares bears to the whole of the subscribed capital of the company. The company having become insolvent, the plaintiffs sued the defendant, a shareholder of the company, in this country for his proportion of the price of the machinery:—

Held, that the defendant did not by becoming a member of the company upon the terms of the memorandum and articles of association authorize the directors to pledge his personal credit for the price of the goods supplied, and that the action could not be maintained.

ARGUMENT of point of law raised on pleadings.

The statement of claim alleged as follows:—

The plaintiffs are a corporation incorporated under the laws of the State of California in the United States of America, and

carried on the business of general machinery manufacturers in the said State.

The defendant is a shareholder in a company called the "Copper King, Limited," whose registered offices are in the City of London, and was at all material times the holder of 62,166 1*l.* shares in the said company.

The said Copper King, Limited, was registered as a joint stock company under the Companies Acts, 1862–1898, with a capital of 350,000*l.*, divided into 350,000 shares of 1*l.* each, all of which was fully subscribed, and by its memorandum of association the objects for which the company was incorporated were (inter alia) :—

To acquire any copper or other mines in the United States of America, Australia, and elsewhere;

To search for, crush, win, get, and prepare for market ore and mineral substances of all kinds;

To purchase machinery and materials of every kind requisite for the purposes of the company.

By the articles of association the directors were empowered by art. 87 (L) to "do all such other things and take such steps as may be now or at any time become necessary so as to comply with any statutory enactment, rule, or regulation in any country, colony, or place where the company may carry on business, or where all or any part of the property and undertaking of the company may be situate."

Pursuant to the said terms of the memorandum and articles of association, and until its bankruptcy and winding-up hereinafter specified, the said Copper King, Limited, carried on business in the State of California aforesaid.

Between September 30 and December 15, 1902, the plaintiffs, in compliance and accordance with contracts made by and between themselves and the said Copper King, Limited, supplied and delivered machinery and goods to and did certain work and labour for the said Copper King, Limited, at the price of $10,404·96. The Copper King, Limited, failed to pay the plaintiffs the said sum or any part thereof, and on February 4, 1903, the plaintiffs commenced an action against the Copper King, Limited, in the superior Court of the

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city and county of San Francisco, in the United States of America, for the said sum.

In or about the month of June, 1903, and before the said action had been tried, certain creditors of the Copper King, Limited, filed a petition in bankruptcy against the said company, and subsequently the said company was adjudicated bankrupt according to the laws of the United States.

In consequence of the said adjudication of bankruptcy the action and all further proceedings therein were stayed.

At an extraordinary general meeting held at the registered offices of the company the shareholders of the Copper King, Limited, passed a resolution that they should be voluntarily wound up, and on August 13, 1903, that resolution was duly confirmed.

By art. 12 of the Constitution of the State of California it is provided as follows:—

By s. 3 (so far as is material to this action), "Each stockholder of a corporation or joint stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

By s. 15, "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favourable terms than are prescribed by law to similar corporations organized under the laws of this State."

By s. 322 of the Civil Code of the State of California it is provided as follows:—

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, and in such action the Court must ascertain the proportion of the claim or debt

for which each defendant is liable, and a several judgment must be rendered against each in conformity therewith. If any stockholder pay his proportion of any debt due from the corporation incurred while he was such stockholder he is relieved from any further personal liability for such debt, and if an action has been brought against him upon such debt it shall be dismissed as to him upon his paying the costs or such proportion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred, and such liability is not released by any subsequent transfer of stock. The term stockholder as used in this section shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another, and also to every person who has advanced the instalments or purchase-money of stock in the name of a minor so long as the latter remains a minor, and also to every guardian or other trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee shall not be liable under the provisions of this section by reason of any such investment, nor shall the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same, but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security or by a trustee or in any other representative capacity does not make the holder thereof a stockholder within the meaning of this section except in the cases above mentioned so as to charge him with any proportion of the debts or liabilities of the corporation, but the pledger, or person or estate represented is to be deemed the stockholder as respects such liability. In corporations having no capital stock each member is individually and personally liable for his proportion of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability as by this section may be brought against one or more stockholders, and similar

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judgments may be rendered. The liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this State."

The said Copper King, Limited, so carrying on business as aforesaid in the State of California, and the defendant as a member and shareholder, became and were subject to the laws of the said State. The defendant as a shareholder is personally liable for the sum of 405*l.* 15*s.*, being the proportion of the debts of the Copper King, Limited, that is to say, of the sum of $11,422·16 (being the price of the machinery together with the costs of the abortive action), as the amount of his shares therein bears to the total subscribed capital of the said company. The defendant pleaded (inter alia) that the statement of claim disclosed no cause of action.

Lush, *K.C.*, and *Ernest Pollock*, for the plaintiffs. The Copper King, Limited, was incorporated for the express purpose of carrying on mining business in the United States including the State of California, and the defendant, by becoming a member of the company, authorized the directors to conduct a mining business in California. That State does not recognise artificial persons like incorporated companies, and only allows such companies to trade there upon the terms of the individual shareholders being personally liable for the company's debts. The defendant must be taken to have made himself acquainted with that law at the time that he authorized the directors to trade there. Indeed, the matter seems to be expressly provided for by art. 87 (L) of the articles of association, whereby the directors were empowered to do all such things as might be necessary to comply with any statutory enactment in any country where the company might carry on business. The joint effect of the authority given by the defendant to the directors to enter into contracts in California and of the law of California with respect to the liability of stockholders was to create privity of contract

between the plaintiffs and the defendant: *Flash* v. *Conn.* (1) There is nothing ultra vires in so authorizing the directors to pledge the personal credit of the shareholders; it does not in any way enlarge the liability of the company, but merely superadds the personal liability of the individual members. If in this case the action had been brought in California, and service had been effected upon the defendant, judgment would necessarily have gone against him, and to an action brought here upon that judgment there would have been no defence. But the rights of the parties cannot be made to depend upon the question of the country in which the action is first instituted. The same result ought to obtain if the action is brought here in the first instance. The case of *Pinney* v. *Nelson* (2) is directly in point. There the defendant was a stockholder in a trading company incorporated in the State of Colorado, which company by the express terms of its charter was incorporated for the purpose of doing business in the State of California, and business was done and debts contracted by the company in the latter State. There is no statute of the State of Colorado providing that a stockholder of a corporation shall be liable for any portion of the indebtedness of the corporation. But it was held by the Supreme Court of the United States that the contract of the shareholders inter se must be assumed to have been made with reference to the laws of California, where the business was to be carried on, and that by virtue of s. 322 of the Civil Code of that State (above set out) the defendant was personally liable for his proportion of the debts.

J. A. Hamilton, K.C., and *Leck*, for the defendant. This action being in contract postulates that there was privity between the plaintiffs and the defendant; and it is said that that privity arose as soon as the contract was made by the company. The answer is that there was no evidence of authority to the directors to pledge the shareholders' credit. It may be that the shareholders might, if they had so chosen, have authorized the directors to do so; but that authority must be sought elsewhere than in the memorandum and articles of association. Indeed, the notion of such an authority is

(1) (1883) 109 U. S. 371. (2) (1901) 183 U. S. 144.

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altogether inconsistent with the memorandum, which expressly provides that the liability shall be limited. The claim is a wholly novel one, and no case decided in this country can be cited in support of it. If it is well founded, then every shareholder of a shipping company will be responsible to the laws of every foreign country where the company's ships may purchase stores and will be personally liable for the price of those stores. The American case of *Pinney* v. *Nelson* (1) is distinguishable. There the action was brought in the State of California, and the defendant was a resident in and citizen of that State, and was subject to the jurisdiction of its Courts. The case does not decide that if the defendant had been resident in and a citizen of the State of Colorado, in which the company was incorporated, the action could have been successfully brought in Colorado, nor does it decide that, if in such case the action had been brought in California and judgment had been obtained there, that judgment could have been sued upon in Colorado. Even in cases within Order XI., r. 1, in which a defendant is properly served out of the jurisdiction, if he does not appear and judgment is obtained against him, it does not follow that he could be sued on that judgment in the foreign country of his residence. Such an action cannot properly be brought unless the defendant was subject to the jurisdiction of the Court in which the judgment was obtained either by reason of allegiance or domicil or appearance: *General Steam Navigation Co.* v. *Guillou.* (2)

Lush, K.C., in reply. The limitation of liability which is imposed by the Companies Acts is in respect of the liability to the company, not in respect of a liability to third persons. If, as is contended, the right of the plaintiffs to recover is independent of the question of the forum, the case of *Pinney* v. *Nelson* (1) is undistinguishable from the present.

Cur. adv. vult.

1905. Jan. 11. KENNEDY J. In this case the plaintiffs are a foreign corporation incorporated under and by virtue of

(1) 183 U. S. 144. (2) (1843) 11 M. & W. 877; 63 R. R. 807.

the laws of the State of California, and carry on the business of general machinery manufacturers there. To this corporation an English company, the Copper King, Limited, which was registered as a joint stock company under the Companies Acts, 1862–1898, became, as the plaintiffs allege, indebted in the year 1902 for machinery and goods supplied to, and work and labour done for, the Copper King, Limited, and their agents, the Pacific Coast Smelting and Refining Company, in San Francisco.

The defendant, Sir Christopher Furness, was, when this indebtedness was created, a large shareholder in the Copper King, Limited. In February, 1903, the plaintiffs commenced an action against the Copper King, Limited, in the superior Court of the city and county of San Francisco, to recover the amount of the debt. Before, however, this action could be tried certain creditors of the Copper King, Limited, commenced in America bankruptcy proceedings against that company, and on their petition the Copper King, Limited, was adjudicated bankrupt according to and under the bankruptcy laws of the United States. In August, 1903, resolutions for a voluntary winding-up of the Copper King, Limited, which had been passed at shareholders' meetings held in the previous June, were duly confirmed. On June 18, 1903, the present action was commenced, in which the plaintiffs seek to recover from the defendant a sum of 405*l.* 15*s.*, being the same proportion of the alleged total claim, consisting partly of the debt above mentioned and partly of costs incurred by the plaintiffs in their action against the Copper King, Limited, which the bankruptcy proceedings rendered abortive, as the amount of the defendant's holding in the Copper King, Limited, bears to the total share capital of the company.

The claim of the plaintiffs as pleaded and as argued before me by Mr. Lush and Mr. Ernest Pollock, who appeared in support of it, is grounded on art. 12 of the Constitution of the State of California and s. 322 of the Civil Code of the same State, and also upon certain provisions in the memorandum and articles of association of the Copper King, Limited.

Sects. 3 and 15 of art. 12 of the Californian Constitution, so

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far as they are pleaded and relied upon by the plaintiffs, provide in substance that each stockholder of a corporation or joint stock association shall be individually and personally liable for all the debts and liabilities which have been contracted during the time he was a shareholder according to the proportion which his holding bears to the subscribed capital stock or shares of the corporation; and, further, that no corporation organized outside the limits of the State shall be allowed to transact business within that State on more favourable conditions than are prescribed by law for similar corporations organized under the laws of the State. The material parts of s. 322 of the Civil Code are to the same effect, and it expressly enacts that the liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within the State of California, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of that State.

The provisions of the memorandum of association of the Copper King, Limited, upon which the plaintiffs rely, declare the objects of the incorporation to be (inter alia) the acquisition of mines, mining rights, and auriferous land in the United States of America, Australia, and elsewhere, and of concessions and privileges which might be worked or developed; the working of ores and minerals; the acquisition by purchase, hire, or otherwise of various kinds of machinery; the carrying out of any of the declared objects in any parts of the world either as principals or as agents; and the doing of all such other things as were incidental or conducive to the attainment of the declared objects of the incorporation.

By ss. (D) and (L) of art. 87 of the articles of association the directors of the Copper King, Limited, were empowered to appoint any person or persons the attorney or attorneys of the board for the transaction of business abroad with such powers as they might deem fit and might be necessary to enable the company's operations to be validly carried on abroad; and to do all such other things as might then be or at any time become necessary so as to comply with any statutory enact-

ment, rule, or regulation in any country, colony, or place where the company might carry on business, or where all or any of the property or undertaking of the company might be situate.

In the statement of defence the defendant, whilst denying or not admitting several of the averments of the statement of claim, which so far as they appear to be material I have set forth above, further objects that the statement of claim discloses no cause of action, and it was ordered that this point of law should be argued in the first instance.

After hearing the argument I reserved my judgment, in order that I might be enabled more fully to peruse and consider two decisions of the Supreme Court of the United States to which the plaintiffs' counsel drew my attention, and upon which they strongly relied, not, of course, as binding authorities, but as valuable supports to their contention. I have found nothing in those cases which affects the view, to which I was strongly inclined at the conclusion of the arguments of counsel, that the defendant is right in his demurrer and that the plaintiffs have no cause of action here. In my opinion, the defendant did not, by becoming a shareholder in the Copper King, Limited, under the memorandum and articles of association, authorize the company, or constitute the company, or any director of the company, his agent to pledge his personal credit or to create a personal obligation enforceable here against him either in the nature of debt or guarantee in favour of those with whom the company might do business either in California or elsewhere.

The Copper King, Limited, is an English company, registered under English law, the liability of whose members is, as the memorandum of association expressly states, limited—limited, that is, under and according to the provisions of the English law which governs such companies, and prescribes and defines the liabilities of the shareholders. Whilst this company may, under the articles, trade and carry on business in any foreign country as therein set forth, and may do all things necessary and conducive to that end, and its directors may under art. 87 of the articles of association take all necessary and proper

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steps to comply, on the part of the company, with the requirements of the law of a foreign country where the company carries on business, a proceeding on the part of the company to enlarge the boundary of the liability of a shareholder beyond the boundary fixed by the constitution of the company must, in my view, be held in an English Court to be ultra vires. Further, whatever be the laws of a foreign country in which an English limited company carries on business, an English Court at all events cannot, in my judgment, recognise as a valid cause of action a claim in respect of debts of the company, arising by virtue of those laws, which is inconsistent with the limitation of the shareholder's liability according to English law. That limitation is the legal basis of the shareholder's relation to the company.

The two American cases do not appear to me to assist the plaintiffs' contention in the present case. In the earlier of the two—*Flash* v. *Conn* (1)—a stockholder was sued for the debt of his company, which carried on business in the State of Florida, and the action was commenced against the stockholder in that State, but the company was incorporated under an Act of the New York Legislature in 1848, which expressly provided for the liability of individual stockholders in such a corporation in respect of debts of the corporate body. The stockholder had therefore become a member of the company upon that condition. In the later American case—*Pinney* v. *Nelson* (2)—the facts were more like those of the present case. There the corporation was founded under the laws of the State of Colorado, but by the express terms of the articles of incorporation for the purpose of carrying on business outside the State, and specifically for carrying on business in the State of California. The defendants, shareholders in the corporation, were sued, and, as Brewer J., who delivered the judgment in the Supreme Court, held, rightly sued, under the provisions of the Californian Constitution and the laws which I have already set forth, in respect of unpaid debts of the corporation. But it does not appear from the report what were the provisions, if any, in the articles of incorporation as to limitation

(1) 109 U. S. 371. (2) 183 U. S. 144.

of liability; all that can plainly be inferred being that neither under those provisions nor under the law of Colorado was there anything expressly declaring the personal liability of stockholders for debts of the corporation. Further—and this seems to me by itself to afford a material distinction, if it were necessary to find one—the action in *Pinney* v. *Nelson* (1) was an action brought in the State of California against stockholders of the corporation who were residents in and citizens of the State. The utmost that the opinion of the Supreme Court in *Pinney* v. *Nelson* (1) can be cited to support is that where a company in accordance with the express provisions of its constitution trades in a foreign State which has in regard to the personal liability of shareholders such laws as the State of California, those laws may properly be enforced in the Courts of that State against a shareholder of the company who is properly within the jurisdiction of those Courts.

Judgment for the defendant.

Solicitors for plaintiffs: *Balfour, Allan & North.*
Solicitors for defendant: *W. A. Crump & Son.*

(1) 183 U. S. 144.

J. F. C.

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Dec. 15, 21.

LONDON, DEPTFORD AND GREENWICH TRAMWAYS COMPANY *v.* LONDON COUNTY COUNCIL.

Tramways — Purchase of Undertaking by Local Authority — Valuation of Tramway—"The then Value"—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.

By s. 43 of the Tramways Act, 1870, the local authority of the district in which a tramway is situate may require the promoters of the tramway to sell to them their undertaking "upon terms of paying the then value . . . . of the tramway." A tramway company were required by the local authority to sell their undertaking under the above section. At the date of the requisition it was the practice, upon an application for parliamentary powers by the promoters of a tramway, to require, as a condition of their obtaining such powers, that the streets in which the tramway was to be laid should be widened, and that the promoters should contribute a certain proportion of the cost of the widening. But at the date when the company obtained their parliamentary powers that practice had not come into existence, and the streets in which their tramway was laid were in fact never widened:—

Held, that, for the purpose of assessing "the then value" of the tramway under the above section, the fact that the local authority would, if they had to make the tramway themselves at the date of their requisition to sell, have to contribute to the cost of widening the streets ought not to be taken into consideration.

CASE stated by an arbitrator.

Under the provisions of the Southwark and Deptford Tramways Act, 1879, as amended by the Southwark and Deptford Tramways Acts, 1881 and 1889, and by the London, Deptford and Greenwich Tramways Act, 1891, the Southwark and Deptford Tramways Company (now called the London, Deptford and Greenwich Tramways Company) were incorporated, and were authorized to construct and maintain certain tramways therein described, and which tramways were purchasable in the year 1900 under s. 43 of the Tramways Act, 1870.

Under the provisions of the Southwark and Deptford Tramways Act, 1881, as amended by the London, Deptford and Greenwich Tramways Act, 1891, the said company were authorized to construct and maintain certain other tramways in the said Acts described, which tramways were purchasable in the year 1902.

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Parts II. and III. of the Tramways Act, 1870, were incorporated with all the Acts hereinbefore mentioned.

On August 20, 1900, the London County Council, being the local authority within whose district the said tramways were situated, gave notice to the company under s. 43 (1) of the Tramways Act, 1870, requiring them as promoters to sell to them the whole of the tramways works and undertaking hereinbefore first mentioned.

On October 1, 1902, the council gave notice to the company under the said section requiring them as promoters to sell to them the whole of the tramways works and undertaking hereinbefore secondly mentioned.

The company and the county council differed as to the value of the said respective tramways undertakings, and the Board of Trade duly appointed Henry Graham Harris as referee to determine the value thereof, exclusive of any allowance for past or future profits of the undertakings, or any compensation for compulsory sale or other consideration whatsoever.

The referee awarded that the value as aforesaid of the said tramways, and of all lands, buildings, works, material, and plant of the company suitable to and used by them for the purposes of the undertakings authorized by the said Acts, was the sum of 91,363*l.* 7*s.* 6*d.*

At the hearing of the reference the following contention was put forward on behalf of the company: At the time of the obtaining of the parliamentary powers for the construction of the tramways, the subject of the reference, it was not the

(1) By s. 43 of the Tramways Act, 1870, "Where the promoters of a tramway in any district are not the local authority, the local authority .... may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway .... by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade."

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practice to require the promoters of tramway undertakings to widen the streets through which the tramways were intended to be run, or to make any contribution towards such widening, nor in fact were any such streets widened or contribution required in the case of the tramways in question. At the date of the notices to purchase hereinbefore referred to, in accordance with the then practice, such streets or some of them would certainly have been required to be widened, and certain costs and expenses would have been incurred in respect thereof, towards which the company would, according to the usual present practice, have been required to contribute one-third as a condition of obtaining powers to establish and work the tramways. It was contended on behalf of the company that, although such widenings had not in fact been made and no contribution had in fact been made by the company in respect thereof, nevertheless, in determining the value of the said tramways undertakings at the date of the notices to purchase, the referee must take into account the costs and expenses which would have been incurred by reason of the practice aforesaid if such tramways had been authorized and constructed at the date of the said notices, on the ground that it was the duty of the referee to determine what would be the present cost of constructing the said tramways; that such present cost would include the contributions which would now be required from the undertakers in respect of street widenings, and that therefore the probable amount of such contributions must be taken into account in determining the present value of the undertakings—in other words, that the present value of the undertakings was enhanced by reason of its being freed from the liability to contribute to such widenings; and counsel for the company tendered evidence to shew what widenings would have been necessary, and what the company's proportion of the cost thereof would have been if the said tramways had been authorized and constructed at the date of the Acts as aforesaid.

Counsel for the county council objected to the reception of such evidence on the ground that it was irrelevant to any question for the referee's consideration; and, further, they contended that, as the company had not in fact been obliged to

contribute to any such widenings, a hypothetical figure as to what they might have been called upon to contribute if the practice at a certain date had been different to what it was could not be taken into account at all in assessing the value of the tramways undertakings.

The referee was of opinion that the contention of the company was bad, but admitted the evidence tendered by them subject to the council's objection, and stated his award in the form of a special case for the opinion of the Court. If the Court should be of opinion that the contention of the company should prevail, he awarded to the company, in addition to the sum of 91,363*l.* 7*s.* 6*d.* hereinbefore mentioned, the further sum of 22,773*l.* 6*s.* 8*d.*, being one-third of the estimated cost of the necessary widenings of the streets.

Lawson Walton, K.C., *Sir E. Boyle, K.C.*, and *Vesey Knox*, for the tramways company. The referee was wrong in refusing to take into account the present practice of requiring the streets to be widened and the tramway promoters to contribute to the cost.

In *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh* (1) and *London Street Tramways Co.* v. *London County Council* (2), where the principle of valuation of tramways under sections corresponding to s. 43 of the Tramways Act, 1870, was considered, the present precise point was not before the Court. But when the latter case was before the Court of Appeal (3), Lindley L.J. expressed himself in his judgment as follows: "The problem is thus reduced to the question, What is the value of the tramway to a purchaser entitled to use it, but who is not to be charged anything in the shape of an allowance of past or future profit of the undertaking? The arbitrator has answered this question by saying that the value is what it would cost the purchaser to lay down the tramway. After much consideration I have come to the conclusion that he is right. Excluding the value of old iron on the one side and all allowance in respect of past or future profit of the undertaking on the other, there appears to

(1) [1894] A. C. 456. (2) [1894] A. C. 489.
(3) [1894] 2 Q. B. 189.

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me nothing left except to say that the present value is either what the tramway cost to make, less some deduction for depreciation from wear and tear, or what it would cost the purchasers to make if they had to make it themselves. Cost price is well known to be no real criterion of the value of an outlay on land. What the result of the outlay will fetch if sold is often much more and often much less than the outlay which has produced it, and the arbitrator was quite justified in not adopting this mode of valuation. There remains only the other which he has adopted." That dictum is no doubt only obiter, but it is directly in point in the present case in the company's favour. If the council had commenced to make the tramway themselves at the date of the notice to purchase, the cost to them of making it would have included, not merely the labour and materials, but also the contribution to the expense of widening the streets.

Cripps, K.C., *Freeman, K.C.*, and *E. Morten*, for the county council. The company are claiming to be compensated for something which they have not done. What is taken over by the council is a tramway in unwidened streets, and the company claim to be compensated as for a tramway in a widened street, and as if they had incurred an expenditure which has not been incurred at all. They say they are entitled to the same amount of compensation whether they have expended the money on widening the streets or not. All that they are entitled to is the original cost of the structure less a deduction in respect of the time it has been in situ. It is contrary to every principle of compensation to consider the value to the purchaser. If the value to the purchaser were what has to be considered, then if the council purchased with the object of substituting electric traction for horse traction, inasmuch as the horse plant would be worth little or nothing to the purchasers, the company ought to get no compensation for it at all.

Lawson Walton, K.C., in reply. This is not a question of compensation at all; it is a case of purchase. The value of the tramway is what any one would give for it. To ascertain that you must consider what, if the tramway were not in existence, it would cost the council to make one. The fact that the

company have not spent any money in widening the streets is immaterial. They are entitled to the benefit of any change of circumstance whereby the cost of making such a tramway has been increased since the date of its construction, whether such increase be in the cost of materials or labour or the conditions of obtaining parliamentary sanction.

Cur. adv. vult.

Dec. 21. BRAY J. This is a special case stated by the referee in his award under the following circumstances: The London, Deptford and Greenwich Tramways Company, whom I shall call the claimants, constructed under parliamentary powers certain tramways, and the London County Council, under the powers conferred on them as the local authority by s. 43 of the Tramways Act, 1870, gave notices to the claimants to purchase their tramways. The claimants and the council differed as to the purchase price, and Mr. Henry Graham Harris was duly appointed referee by the Board of Trade. During the course of the arbitration a contention was raised by the claimants that the present value of the tramways was enhanced by their being freed from liability to contribute to the widening of some of the streets in which the tramways were laid, to which, according to the present usual practice, they would if constructed now have been required to contribute, although in fact such widenings had not been made and no contribution had been made by the claimants. The referee considered such contention to be unfounded, but, at the request of the claimants and on certain terms, heard the evidence upon the point, and stated his award in the form of a special case in order that the opinion of the Court might be obtained as to the validity of that contention; and this is the question I have now to determine.

The argument of the claimants' counsel was shortly this. The House of Lords in *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh* (1) and *London Street Tramways Co.* v. *London County Council* (2) decided in effect that the value of the tramways must be measured by what it would

(1) [1894] A. C. 456. (2) [1894] A. C. 489.

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cost at the date of the sale to establish the tramway if it did not then exist, subject to a proper deduction for depreciation. By reason of the practice which had now become usual, though it did not exist when the claimants obtained their parliamentary powers, the promoters if they had to construct their tramways now would have had to contribute one-third of the cost of the widening of at all events certain of the streets as a condition of their obtaining their powers, and, therefore, at the date of the sale, in order to establish the tramways, the promoters would have to pay, not only the actual cost of construction, but the contribution in addition, and the referee ought to take this into consideration in assessing the value.

It certainly is a startling proposition that the council should have to pay as part of the purchase price for an expenditure which has never been incurred, and it was admitted that the contention was novel and that there was no authority to support it. As there was no authority upon the point, I thought it right to take a few days to consider it. I have come to the conclusion that the referee was right when he expressed his opinion that the contention was wholly unfounded. I have read through the judgments in the House of Lords, and of Lindley L.J. in the Court of Appeal, and I can find nothing to support the contention. The effect of the judgments seems to be that, as the words of s. 43 prohibit profits or rental value being considered, it is necessary to fall back on what is called in rating cases "structural value," but that is the structural value of the tramway as it exists, and in all the judgments it is referred to as the cost of "the purchased tramways" or other equivalent words. It is true, of course, that no such point as the present was raised in that case, and it was not contended on behalf of the county council that there was anything in that case that precluded me from adopting the claimants' contention, but I can find nothing to encourage it. I think Mr. Cripps pointed out at all events one of the answers to the claimants' contention when he said that the referee has to find the value of a tramway in an unwidened street, while the claimants are asking him to find the value of a tramway in a widened street. He has to find the value of

an actual, not an imaginary tramway. The tramway in a widened street would be a different and it may well be a more valuable tramway. There would be more room for traffic, and possibly more cars might be run and more passengers carried, but it is sufficient to say it is a different tramway. Another answer is that to calculate the structural value is only a mode of arriving at the real value, and to adopt that mode of calculation in the manner suggested by the claimants would not give the true value. It would be absurd to say that the true value of the tramway would be enhanced by the adoption of a practice as to other tramways in other streets. Although in this case the contention would give the claimants a large additional price, in another case where onerous conditions which were imposed when the tramways were constructed were no longer imposed it would follow, if the claimants' contention were correct, that the claimants would lose the cost of fulfilling those onerous conditions, which would appear to be manifestly unjust. The real value of the tramway is not altered by the change of practice. Many illustrations might be put. What if it became the practice to insist on double the depth of concrete being put in? Ought the value of the tramway to be enhanced by the cost of the additional concrete which if constructed now would have to be laid, but which was not required to be laid nor was laid? Mr. Walton was obliged to admit that the contention involved this, and so also if it became the practice to require an additional width of stone or other material outside the rails to facilitate the ordinary traffic. Surely unless the additional expenditure was actually incurred it would not be right to increase the cost of the actual structure. The Court, therefore, must declare that it is of opinion that the claimants' contention should not prevail, and nothing must be added to the sum of 91,363*l.* 7*s.* 6*d.*

Judgment for the London County Council.

Solicitors for tramways company: *Sutton, Ommaney & Rendall.*

Solicitor for county council: *Blaxland.*

J. F. C.

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[IN THE COURT OF APPEAL.]

ELLIS *v.* JOSEPH ELLIS & CO. (ROBERTS AND TAYLOR SURVIVING PARTNERS).

Employer and Workman—Workmen's Compensation—Partner working at Wages—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1, *and s.* 7, *sub-s.* 2.

A member of a partnership formed for the purpose of working a mine, by arrangement with his co-partners, worked in the mine as a working foreman, and received weekly wages out of the profits of the business. While working in the mine, he met with an accident which caused his death, and his widow thereupon claimed compensation under the Workmen's Compensation Act, 1897, from the surviving partners:—

Held, that the case contemplated by the Workmen's Compensation Act, 1897, was that of a workman employed by some other person or persons; that, the deceased having been himself one of the partners in the firm for which he was working, he could not be said to have been employed by them; and therefore that the case was not within the Act, and the applicant was not entitled to compensation.

APPEAL against the award of the judge of the county court of Flintshire upon a claim for compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow and personal representative of one Joseph Ellis, deceased. The respondents were the two surviving partners of a firm called Joseph Ellis & Co. It appeared that by an indenture of agreement dated November 9, 1898, and made between Henry Cross, as agent of the owners, of the one part and Joseph Ellis of the other part, a licence was granted to the latter to work the coal cannel, coal slack, ironstone, surface clay, and fireclay, lying under certain lands, known as the West Buckley Colliery, for the term of twenty-one years. On July 17, 1903, a deed was executed between Joseph Ellis of the one part and John Taylor, earthenware manufacturer, and Thomas Roberts, draper, of the other part, whereby the said Joseph Ellis, in consideration of a sum of 300*l.*, assigned to the said John Taylor and Thomas Roberts, respectively, third shares of all his estate and interest under

the before-mentioned agreement of and in the mines therein described, and the said parties mutually covenanted to become partners under the name of Joseph Ellis & Co. for the purpose of effectually exploring and working the mines and veins comprised in the said agreement, for the washing, smelting, and refining of all ores or minerals which might be produced from such mines or veins, and for the sale of all such produce, either in a natural or manufactured condition. The deed further provided (inter alia) that each of the partners should, upon the execution thereof, pay into the partnership account at a bank the sum of 50*l.*; that the capital of the firm should be 300*l.*, of which the sum of 150*l.* was the estimated value of certain machinery, plant, and stock-in-trade, described in a schedule to the deed, and then or thereafter to be placed on the premises, and the remaining sum of 150*l.* was the sum to be paid to the bankers of the firm as thereinbefore provided; and that the profits and losses of the business should be divided between the partners in equal shares. A short time after the formation of the partnership the partners orally agreed among themselves that, if any partner did any work at the colliery, he should be paid like any ordinary workman. The deceased man Ellis, who had practical experience as a working miner and engineer, acted in the capacity of a working foreman at the colliery, working himself, sometimes above ground in charge of the engine and otherwise, and sometimes underground, and directing the operations of the other workmen employed. He had received by way of wages out of the proceeds of the business on the average about 33*s.* a week. On November 15, 1903, while the deceased was working underground, through the chain by which a tub was being lowered breaking, the tub fell upon the deceased and so injured him that he died. The applicant thereupon claimed compensation under the Workmen's Compensation Act, 1897, for herself and two children of the deceased as having been wholly dependent upon him at the time of the accident, the claim being expressed to be made against "Joseph Ellis & Co. (Thomas Roberts and John Taylor surviving partners) of West Buckley Colliery."

The county court judge held that the case came within the

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Workmen's Compensation Act, 1897, and awarded as compensation the sum of 250*l.*, to be apportioned between the deceased's widow and children as directed by the award.

Powell, K.C., and *Ellis Griffith*, for the respondents. This case does not come within the provisions of the Workmen's Compensation Act, 1897. That Act contemplates the case of a workman employed by another person or other persons under a contract of employment. The deceased in this case was a partner, and could not be in the employment of the firm of which he was a member. The sums which were paid him by way of remuneration for his work may be called "wages" in one sense, but they were really a share of the profits of the business to which he was by agreement to be entitled before the profits divisible between the partners in equal shares were ascertained. The deceased may have been within the definition of a "workman" contained in the 7th section of the Act in so far as his work was concerned, but he was not in the employment of any employer within the meaning of the Act. The case is in that respect analogous to that of an independent contractor, who, although he does manual labour, has been held not to come within the Act: *Vamplew* v. *Parkstone Iron and Steel Co.* (1)

Secondly, assuming that the case falls within the Act, only two-thirds of the amount of compensation assessable under the Act ought to be borne by the surviving partners. The accident happened when all three partners constituted the firm, but by the award the liability is treated as falling on two only.

C. A. Russell, K.C., and *H. C. Davenport*, for the applicant. The work which the deceased man did formed no part of his duty as a partner under the partnership agreement. It was work done in a capacity totally independent of that of a partner, for which, by agreement with the other partners, he was to receive wages like any other workman. It is submitted that there is nothing in the Act to prevent a person from being a partner in a business and at the same time an employee of

(1) [1903] 1 K. B. 851.

the partnership for the purposes of the Act as a workman. If it be held that in a case like this the Workmen's Compensation Act, 1897, has no application, the effect of such a decision may be very sweeping, for it is becoming not uncommon in trading and manufacturing businesses to give the employees a share of profits. It may be that it would not be possible for a person in the position of the deceased to sue for wages, because technically a person cannot be both plaintiff and defendant, but it is submitted that no such difficulty really arises under the Workmen's Compensation Act, 1897. The deceased man came within the definition of a workman given by s. 7, sub-s. 2, which is, "Every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship, or otherwise, and is expressed or implied, is oral or in writing." That definition clearly contemplates that the agreement need not be one of service strictly so called. In this case there was an agreement analogous to one of service, which imposed duties and conferred rights on the deceased other than those of a partner. The other two partners may, for the purposes of the Act, be regarded as the employers of the deceased.

With regard to the second point, assuming the liability under the Act to have been that of the firm, it survives on the death of one partner as against the surviving partners. No question of the right to contribution (if any) from the estate of the deceased can arise in the present proceeding. Such a question would only arise on a winding-up of the partnership accounts.

Powell, K.C., for the respondents, was not called on to reply.

COLLINS M.R. The question is whether, under the circumstances of this case, the widow and personal representative of the deceased man can claim the benefit of the Workmen's Compensation Act, 1897. The deceased was a man belonging to the working class, but he had obtained a licence to work the coal cannel, coal slack, ironstone, surface clay, and fire-clay, lying under certain lands, for a term of twenty-one years. Having obtained that licence, he entered into a partnership

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agreement with two other persons, one of whom was an earthenware manufacturer and the other a draper, by which the three agreed to become partners for the purpose of exploring and working the mines and veins comprised in the licence, for the washing, smelting, and refining of all ores or minerals which might be produced from such mines or veins, and for the sale of all such produce either in a natural or a manufactured condition. The deceased appears to have been a skilled workman, and, by agreement with his partners, he worked at the mine, sometimes on the surface and sometimes underground, for wages; and, while working underground, he met with an accident which occasioned his death. His representative thereupon claimed compensation under the Workmen's Compensation Act, 1897, on behalf of herself and his children. The question is whether, having regard to his position as one of the partners, he can be regarded as a workman in the employ of the partnership, and the partners as his employers, within the meaning of the Act. When one looks at the provisions of the Act, they do not appear to be applicable to a case like the present. The supposition that the deceased man was "employed," within the meaning of that term as used in the Act, would appear to involve that he, as one of the partners, must be looked upon as occupying the position of being one of his own employers. It seems to me that, when one comes to analyze an arrangement of this kind, namely, one by which a partner himself works, and receives sums which are called wages, it really does not create the relation of employers and employed, but is, in truth, a mode of adjusting the amount that must be taken to have been contributed to the partnership assets by a partner who has made what is really a contribution in kind, and does not affect his relation to the other partners, which is that of co-adventurer and not employee. Such a partner cannot put himself in the position of not being a partner when he is one, or of being a workman employed, when that position would involve that he would be both employer and employee. The definition of a "workman" given in the Act might cover a person in such a position, apart from the difficulty that arises from the consideration that

he would be his own employer; but that is not conclusive, because the applicability of the Act appears to depend not merely on the question whether the injured man was a workman within the definition given by the Act, but also on the existence of the relation of employer and workman. Sect. 1, sub-s. 1, provides that, "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." That section appears to me clearly to contemplate a relation between two opposite parties, of whom one is employer and the other employee. It seems to me obvious, when the true position of the deceased is analyzed, that he was not such a workman as is contemplated by the Act, and that a person cannot for the purposes of the Act occupy the position of being both employer and employee. The short point upon which this case depends is that the deceased man was not really an employed person with employers such as the Act contemplates, and the county court judge was therefore wrong in treating him as coming within the Act. For these reasons I think the appeal must be allowed.

MATHEW L.J. I am of the same opinion. The argument on behalf of the applicant in this appeal appears to involve a legal impossibility, namely, that the same person can occupy the position of being both master and servant, employer and employed. The deceased man in this case was a partner; and the arrangement made between him and his co-partners as to the payment of wages to him was really an agreement with regard to the mode in which accounts were to be taken between the partners, and to the share of profits to be received by him in excess of that received by the other partners in consideration of the work done by him. The Workmen's Compensation Act, 1897, cannot in my opinion apply to such a case.

COZENS-HARDY L.J. I am of the same opinion. It was urged upon us that the effects of deciding against the claim in

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this case would be very far-reaching, because many companies give the workmen employed by them a share of profits. But in those cases the companies would generally be incorporated. All that our decision in this case amounts to, I think, is that the Act only applies where there is on one side an employer, and on the other side a workman, who are different persons. That condition would be satisfied in the case of a workman employed by an incorporated company who receives a share of profits, but not in a case where a partner by arrangement with the other partners receives in return for work done by him sums of money, whether called salary, wages, or drawings, out of the partnership assets.

Appeal allowed.

Solicitors for applicant: *Royds & Rawstorne, for E. S. Giles, Chester.*

Solicitors for respondents: *Treadwell & Aylwin, for Keene, Son & Kelly, Mold.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1905 Jan. 16.

GREAT NORTHERN RAILWAY COMPANY *v.* DAWSON.

Employer and Workman—Workmen's Compensation—Earnings of Workman—Use of Clothes provided by Employer—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *First Schedule* (1) (*a*) (*i.*).

Where a workman was allowed by his employers to have the use for the purposes of his employment of a uniform, which was provided by them, and the property in which remained in them:—

Held, that the value to the workman of the use of the uniform formed an element which must be taken into account in estimating his earnings for the purpose of compensation under the Workmen's Compensation Act, 1897.

APPEAL against the award of the judge of the Hertfordshire County Court as to the amount of compensation payable to the dependants of a deceased workman under the Workmen's Compensation Act, 1897.

The deceased man had been employed as a goods guard by the Great Northern Railway Company, and had been killed through an accident which arose out of and in the course of his employment. It was not disputed that, in respect of the wages which had been paid to him in money, there must be compensation to the amount of 193*l.* 10*s.* 2*d.*, and the county court judge had made an award on that footing. It appeared, however, that by the regulations of the company a goods guard was required to wear a uniform, which was provided by the company, but which did not become his property, and had to be given up to the company if he ceased to be in their service. It was contended for the dependants that, in estimating the compensation, some addition should be made in respect of this uniform to the amount of the wages paid in money. It appeared that the cost price to the company of the uniform which had been supplied to the deceased was 7*l.* The county court judge held that, as the property in the uniform remained in the company, it could not be taken into account in estimating the compensation.

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S. T. Evans, K.C., and *P. T. Blackwell*, for the workman's dependants. The authorities clearly shew that the county court judge was wrong in excluding from consideration the fact that, in addition to the wages paid him in money, the workman enjoyed the use of clothing provided for him by the company. The fact that the property in the uniform did not pass to him, and that, if he left the service of the company, he would have to deliver it up, might be material under some circumstances to the question of the quantum to be allowed, but is not material in point of principle. The use of the uniform must be of value to the workman, because but for it he would have to provide more clothing for himself.

[They cited *Noel* v. *Redruth Foundry Co.* (1); *Pomphrey* v. *Southwark Press* (2); *Houghton* v. *Sutton Heath and Lee Green Collieries Co.* (3); *Abram Coal Co.* v. *Southern* (4); *Sharpe* v. *Midland Ry. Co.* (5)]

Basil Watson (*Montague Lush, K.C.*, with him), for the company. The workman cannot be said to have been given the use of the uniform as part of his wages. He was required by the company to wear it as part of his duty, while at work, for their convenience and for the purpose of his identification as an official of the company. The cases of *Houghton* v. *Sutton Heath and Lea Green Collieries Co.* (3) and *Abram Coal Co.* v. *Southern* (4) were cases in which it was sought to make deductions from the wages actually paid in money to a workman in respect of the use of tools or other matters supplied to him by the employers, and therefore differed from the present case. It was held, however, in the latter case that "earnings" in the Act means the sum which the workman gets for his work when he comes to it properly equipped according to the general understanding and practice in that particular trade. If that definition is correct, the value of the uniform which formed part of the guard's equipment is not part of his earnings. The question raised before the county court judge was really whether the value of the uniform was to be added

(1) [1896] 1 Q. B. 453, at p. 456.
(2) [1901] 1 K. B. 86, at p. 90.
(3) [1901] 1 K. B. 93.
(4) [1903] A. C. 306.
(5) [1903] 2 K. B. 26; [1904] A. C. 349.

to the wages in money, and he rightly held that, as the property in the uniform did not pass to the workman, it ought not to be added to the wages.

S. T. Evans, K.C., in reply. On the facts no distinction really arose between the value of the uniform and the value of the use of it to the workman. The deceased had been in the service of the company for many years, and the value of the clothes of which he had the use may be regarded as exhausted by wear.

COLLINS M.R. This is an appeal by the dependants of a deceased workman from the decision of a county court judge, the question being as to the amount of compensation to which the dependants were entitled in consequence of the workman's death. There was no doubt that they were entitled to compensation to the extent of 193*l.* 10*s.* 2*d.*, having regard to the aggregate amount of the wages paid to the workman in money during the three years next before the injury which occasioned his death; but it was said on behalf of the dependants that, in addition to those wages, the workman had received from the company, his employers, clothing to the value of 7*l.* during those years. The learned county court judge has rejected the value of that clothing as a factor in estimating the amount of the workman's earnings, on the ground apparently that by the terms of the company's regulations the property in the clothes did not pass to the workman. I do not think that was an adequate ground for excluding the suggested factor from consideration. If the workman received as part of the emoluments of his employment the use of the clothing, then the value of that use was, as it appears to me, being earned by him as part of those emoluments, and, upon the authorities, I think it must be taken into consideration. I can conceive of cases in which it might be suggested that the actual value of the use of clothing would be nothing, because the clothing might be of such a nature that the use of it could not be considered as a privilege, but the present is not a case of that kind. In this case during the three years prior to the accident the deceased workman appears to have been allowed by his employers to

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have the use of clothing, which he did use to the extent of the value assumed by both parties to represent the price of the clothing, which was probably less than what the workman would have had to pay if he had himself provided it. I think that must be regarded as an emolument which he received, in addition to his money wages, in return for his services, and which according to the authorities must be taken into account in estimating his earnings. I do not think that it is necessary in this case to go into any distinction between the value of the clothes themselves and the value of the use of them. In the course of the period during which the clothes were in this case used, their original value may be regarded as pretty well exhausted, and practically the value of the clothes themselves and the value of the use of them may be regarded as represented by the same amount. Though it may be right to say that, strictly speaking, it is the value of the use of the clothes, and not the value of the clothes themselves, that must be considered in such a case, in the present case there is really no distinction between them. Therefore I think that the amount taken as their cost in this case ought to be added to the amount received by the workman in money, and this appeal must be allowed.

MATHEW L.J. I am of the same opinion. The strict measure of compensation in this case would, I think, be the sum saved to the workman by reason of his having the use of uniform, and so avoiding the wear and tear which would be occasioned to the ordinary costume of a man in his position. There is in this case however no necessity to go into any minute calculations on the subject, because it was conceded at the trial that the amount of 7*l.*, which was agreed to be the cost of the uniform, substantially represents the amount which must be added to the wages, if the contention for the dependants is correct. With regard to that amount, I feel compelled to come to the conclusion that the county court judge was wrong, and the appeal must be allowed.

COZENS-HARDY L.J. I agree. It must, I think, upon the authorities, be taken to be a fallacy that the wages in money

are necessarily to be the measure of the workman's earnings for the purposes of the Act. It cannot be doubted, for instance, that, if a workman is, in addition to his wages in money, allowed to occupy a house belonging to his employer, the value of that occupation must generally be considered as part of his earnings, because the necessary inference would be that, but for this privilege, the amount of his wages in money would be higher. Again, in the case of a workman required when on duty to wear uniform of a pattern approved by his employers, it appears to me obvious that the privilege of being given the use of such a uniform by the employers, and thereby relieved from the necessity of paying for it out of his own pocket, must be considered as an additional emolument to be taken into account in estimating his earnings. I agree that the true test in such a case is not what the uniform would cost the employers, but the value to the workman of the privilege of using it when on duty. But in this case that distinction becomes immaterial, because any difficulty which might arise therefrom is removed by the fact that under the circumstances the amount of 7*l.*, which was the cost of the uniform, may fairly be taken as representing the value of the use of it. The judgment of the county court judge appears to have proceeded solely on the ground that the property in the uniform did not pass to the workman. For the reasons which have been given I do not think that is the true test.

Appeal allowed.

Solicitors for appellants: *Kingsford, Dorman & Co., for H. B. Hartley, Peterborough.*

Solicitor for respondents: *R. Hill Dawe.*

E. L.

C. A.
1905
Jan. 16.

[IN THE COURT OF APPEAL.]

CASTLE SPINNING COMPANY, LIMITED *v.* ATKINSON.

Employer and Workman — Workmen's Compensation — Redemption of Employer's Liability — Application limiting Sum for Redemption — Jurisdiction of County Court Judge — Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *First Schedule, clause* 13.

It is not competent, under clause 13 of the First Schedule to the Workmen's Compensation Act, 1897, for employers to apply for redemption of their liability to make weekly payments by way of compensation subject to a limit specified in the application of the sum to be payable for redemption; and a county court judge has no jurisdiction to entertain an application so limited.

APPEAL against the award of the judge of the county court of Ashton-under-Lyne upon an application under the Workmen's Compensation Act, 1897.

Injury having been occasioned to a workman through an accident which arose out of and in the course of his employment, his employers by agreement paid him a weekly sum of 1*l.* from the period of a fortnight after the accident. After these payments had continued for about a year, the employers filed a request for arbitration in the county court, asking for a review and termination, or diminution, or for redemption limited to the amount thereinafter set forth, of the weekly payment. The particulars annexed to the request were as follows: "The applicants say that the respondent is no longer totally incapacitated for work by the said accident, and they therefore ask for an order terminating or reducing the said weekly payment; alternatively the applicants seek to have the said weekly payments redeemed by the payment of a sum not exceeding 150*l.*, which sum the applicants are willing to pay the respondent by way of redemption." Upon the case coming on for hearing, the county court judge refused to order any diminution of the amount of the weekly payments. As regards the application to redeem the liability for the same, the

objection was taken on behalf of the workman that the Workmen's Compensation Act, 1897, did not contemplate such an arbitration as was involved by the limitation of amount contained in the employers' request for arbitration, and that the county court judge therefore had no jurisdiction to deal with the matter on the employers' application as framed. The county court judge, however, held that he had jurisdiction, and ultimately ordered that the employers' liability should be redeemed by payment of the sum of 150*l.*

C. A. Russell, K.C., and *Adshead Elliott*, for the workman. The language of clause 13 of the Workmen's Compensation Act, 1897, clearly shews that, if the employers desire to redeem the liability to make the weekly payments, they must, in default of agreement on the sum to be paid, go to arbitration in order that the arbitrator may fix the sum. They cannot require an arbitration limited in the manner proposed in this case. Such an arbitration would be abortive, if the arbitrator thought that the sum mentioned as a limit was not sufficient. The result of such a limitation might, in doubtful cases, be to hamper the arbitrator's discretion, and to bias him in the direction of finding the sum mentioned to be sufficient, rather than that there should have to be another application. The Act contemplates that the amount of the sum to be paid should be left to the free and unfettered discretion of the arbitrator. The arbitration contemplated by the Act is one to fix what sum is to be paid for redemption. The arbitration requested by the employers is one to determine whether the sum named by the employers is sufficient. The Act does not provide for such an arbitration, and therefore the county court judge had no jurisdiction to entertain the application. The request for arbitration in this case departs entirely from the form 5 given by the Workmen's Compensation Rules, 1898.

A. Powell, K.C., and *Wingate-Saul*, for the employers. It is perfectly reasonable that the employer should be able to pursue the course taken in this case, and there is nothing in the language of the Act to compel the Court to hold that there cannot be an arbitration under it limited to the question

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whether a sum offered by the employer for the redemption of the liability is sufficient. It is a serious matter for the employer if he can only redeem his liability on the terms of submitting to the payment of any sum which, in his unlimited discretion, the arbitrator, who may be a deputy county court judge not familiar with cases of this kind, or perhaps a lay arbitrator, may think fit to fix; and employers may often be unwilling to incur that risk. It has been thought by some county court judges convenient, with a view to facilitating the redemption of the liability of employers to the advantage of both parties, that applications should be made for redemption in the form adopted in this case, and accordingly in many courts the practice has been to entertain such applications. No hardship is entailed upon the workman. If the county court judge does not think the sum offered by the employer for redemption sufficient, he dismisses the application with costs against the employer, and the workman remains entitled to the weekly payments as before. Such an arbitration as here took place seems to come within the terms of s. 1, sub-s. 3, of the Workmen's Compensation Act, 1897. The forms contained in the rules framed under the Workmen's Compensation Act, 1897, are not exhaustive, and modified forms may be adopted as occasion requires: see rule 67 of the Workmen's Compensation Rules, 1898.

C. A. Russell, K.C., was not called on to reply.

COLLINS M.R. This is an appeal from the decision of a county court judge upon an application made to him under clause 13 of the First Schedule to the Workmen's Compensation Act, 1897, which provides that "Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned." In this case what happened was that, a weekly payment by way of compensation having been continued for

about a year, there was then an application by the employers for the diminution of the weekly payment, or alternatively that the liability for it might be redeemed by payment of a lump sum not exceeding 150*l*. The point was taken on behalf of the workman that an application subject to such a limitation was not within the language of clause 13, and that the Act did not contemplate that there should be an arbitration upon such a question as would arise on the employers' application in this case. It is argued that it would be a very one-sided and unreasonable proceeding that there should be a discussion before an arbitrator or a county court judge as to the proper sum to be paid for redemption of the liability, which could only be effective if the arbitrator or county court judge came to the conclusion that the sum to be paid ought not to exceed the limit mentioned in the application; that what the Act contemplates is a free and unfettered arbitration as to what sum ought to be paid for the redemption of the liability, and not one limited and fettered as proposed; and it is further suggested that the introduction of a limit as to the amount to be fixed might have the effect of prejudicing the mind of the tribunal. In this case the introduction of a limit does not appear to have had the slightest effect on the decision of the county court judge, and I gather that he has arrived at the conclusion that the sum mentioned by the employers is the proper sum after the fullest consideration of all relevant matters; and therefore there is no reason to suppose that in point of fact there has in this case been any miscarriage of justice; but we have to deal with the technical question whether, assuming that there was in this case a perfectly just adjudication, it was, nevertheless, outside the limits of the county court judge's jurisdiction. After carefully considering that question, I have come to the conclusion that clause 13 of the First Schedule to the Workmen's Compensation Act, 1897, does not contemplate a limited arbitration such as has taken place in this case. We are dealing with a statutory provision in which the Legislature has laid down the terms on which a certain privilege is conferred on the employer. The workman has no option in the matter, and has not the right to apply for the redemption of the liability. The employer

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has that right conferred upon him by the statute, but he must take it on the terms on which it is offered him by the statute; and, if he desires to redeem the liability, he must do so by paying such a sum as the arbitrator or county court judge in his unlimited discretion thinks it right to give. There is no power given by the clause to fetter his discretion, or to compel the workman to take part in an arbitration which may prove abortive by reason of a limit imposed by the terms of the application. On the view put forward by the employers in this case, if the arbitrator or judge thought that the sum mentioned in the application was not sufficient, he could not award any sum, and the result would be that the weekly payments must continue as before, but the time of the workman would have been wasted by a fruitless inquiry instituted for the benefit of the employer. The employer might have to bear the costs of the inquiry, but costs are not always a complete indemnity to a successful party, at any rate for the waste of time and trouble and annoyance occasioned by an abortive inquiry. It seems to me that the Legislature did not contemplate and has not provided for what may be called an experiment on the part of the employer as to whether the sum which he is prepared to pay for the redemption of the liability is such a sum as the workman ought to accept. If the employer desires to redeem the liability, he cannot make such an experiment, but must be prepared to pay whatever sum the arbitrator or county court judge may fix. I am not prepared to say whether it might or might not be convenient, as suggested by the counsel for the employers in this case, that the employer should have power in making an application for redemption of liability to name a sum beyond which he is not prepared to go. Possibly in some instances it might be convenient that he should have that power, but we have no right to go beyond the words of the Act, and are not concerned with the question whether any amendment of it in this direction would be desirable. It appears to me that, though the question with which we are dealing may be called technical, it goes to the root of the county court judge's jurisdiction in the matter, and therefore I think that the portion of his order which concerns the right of the

employers to redeem their liability cannot stand, because made without jurisdiction. The result is that weekly payments of the original amount must continue to be made, but the right of the employers to make an application for redemption unfettered by any limit of course remains. For these reasons I think the appeal must be allowed.

MATHEW L.J. I am of the same opinion. There appears to me to be no way of escaping from the technical difficulty which arises in this case. There is no provision in this Act such as exists in some other Acts for preventing a technical slip from being fatal where it has not really resulted in any miscarriage of justice; as for instance the provision in Order XXXIX., r. 6, which obviates the necessity for a new trial, where there has been a misdirection or an improper admission or rejection of evidence, if the Court thinks that it has not occasioned any substantial wrong or miscarriage in the trial. There is no provision of that kind in this Act. The language of clause 13 seems to contemplate an arbitration in which the arbitrator shall have a full and unfettered discretion as to the sum to be fixed for redemption, and not merely a discretion up to a certain amount. In support of the appeal it was suggested that the introduction of such a limitation as was proposed into the terms of the arbitration would have a tendency to induce the arbitrator to limit his view of the proper amount to be fixed to the sum specified by the employers. In this particular case there appears to me to be no ground whatever for supposing that the county court judge's mind was so influenced. But, inasmuch as the Act does not appear to contemplate an application for redemption limited as in the present case, I think we have no alternative but to allow the appeal.

COZENS-HARDY L.J. I am of the same opinion. The question in this case seems to me to be simply as to the true construction of clause 13 of the First Schedule to the Workmen's Compensation Act, 1897. The county court judge was exercising the limited jurisdiction conferred by that enactment,

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Cozens-Hardy L.J.

and, for the reasons given by the Master of the Rolls and my brother Mathew, it seems to me plain that the clause contemplates an unfettered arbitration as to the proper amount to be paid for redemption of the employer's liability, and not one hampered by any limitation of that amount. The employers in effect contend that they may apply to the county court judge to determine whether a sum which they offer is sufficient, but I can see no foundation for this contention in the language of clause 13. It is for the county court judge to fix what in his opinion is the proper sum to be awarded, and he is not to be placed in the position of being unable to make any award at all in one point of view, i.e., if he thinks that the limited amount named by the employer is not sufficient. It is not for us to say whether it would be convenient or desirable that the employer should have power to specify in his application a limit beyond which he is not willing to go, as was done here; and, if the Act is to be amended in that respect, it must be by the Legislature and not by us.

Appeal allowed.

Solicitors for workman: *Bower, Cotton & Bower, for J. B. Pownall, Ashton-under-Lyne.*

Solicitors for employers: *William Hurd & Son, for Chapman & Brooks, Manchester.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1905
Jan. 18.

AYLWARD *v.* MATTHEWS.

Employer and Workman—Workmen's Compensation—Building—Temporary Wooden Structure—Crane Platform—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A temporary wooden structure of a substantial nature, such as a platform sixty-two feet in height for a steam crane, to be used in the construction of a building, may be a building within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897.

APPEAL against the award of the judge of the Lambeth County Court upon a claim for compensation under the Workmen's Compensation Act, 1897.

The applicant for compensation, Aylward, was employed by the respondent Matthews, who had contracted for the erection of a platform for a steam crane, which was to be used in the construction of a board school building. The platform, which was of timber, was supported by three long legs, which respectively consisted of upright baulks of timber placed in the form of a hollow square, each side measuring four and a half feet, and connected with cross-pieces of wood. These legs were let into the ground, and surrounded at the base with bricks or other heavy materials to keep them fixed. Upon the cross-pieces of the legs planks were placed, upon which ladders rested, thus forming a scaffolding by means of which the platform was being erected. The platform was about sixty-two feet above the ground. The respondent's business was that of a contractor for the erection of such crane platforms, and, when the erection of a crane was completed, he had nothing to do with the building operations carried on by means of it, upon the completion of which he removed the crane and platform. The applicant, while engaged in the erection of the crane platform, fell from a ladder forming part of the scaffolding in consequence of the breaking of a plank upon which the ladder rested, and sustained injuries in respect of which he claimed compensation. At the time of the accident

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the school buildings had not reached a height of thirty feet, the foundations only having been laid. The county court judge decided that the crane platform was a building within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, and that, as it exceeded thirty feet in height and was being constructed by means of a scaffolding, the applicant was entitled to compensation.

Minton-Senhouse, for the respondent. A temporary structure of wood, such as was being constructed in the present case, for the purpose of erecting a building, cannot be regarded as itself a building for the purposes of the Act. No one would in common parlance say that the respondent in this case had contracted for the erection of a building. [He cited *McNicholas* v. *Dawson & Son* (1); *McCabe* v. *Jopling*. (2)]

John O'Connor, for the applicant. The term "building" may fairly be applied, according to the ordinary use of language, to such a structure as this crane platform. A building may be of wood. The facts that the building was not intended to be permanent, and that it was erected for the purpose of constructing another building, are really immaterial.

Minton-Senhouse, in reply.

COLLINS M.R. In this case the county court judge has found as a fact that a certain wooden structure, exceeding thirty feet in height, the object of which was to form a platform for a steam crane to be used for the purpose of erecting a building, and which was being constructed by means of a scaffolding, was itself a "building" within s. 7 of the Workmen's Compensation Act, 1897. The county court judge's finding of fact concludes the question, unless we are in a position to lay it down as a matter of law that such a wooden structure cannot be said to be a building. I confess that at first sight I was somewhat startled at the notion that a temporary wooden platform, erected for a crane to be used in the process of constructing a building, could itself be a building for the purposes of the Act. In dealing, however,

(1) [1899] 1 Q. B. 773. (2) [1904] 1 K. B. 222.

with an Act framed as is the Workmen's Compensation Act, 1897, it is hardly possible to apply any ordinary rule of construction or principle to the interpretation of its provisions; and one can only do one's best to discover its meaning by consideration of the language used in connection with the objects at which its provisions appear to be aimed. The Act would appear to have contemplated, among other things, the risks which would arise, in the case of the erection or repair of buildings exceeding thirty feet in height by means of scaffolding, of workmen falling from the building or the scaffolding, or of things falling upon workmen below. These are risks which would certainly be incident to the erection by means of a scaffolding of a structure of the kind with which we are dealing in this case, as much as to the erection of permanent buildings of brick or stone. The question is really I think one of fact, and I do not feel myself in a position to say as a matter of law that a structure of the kind in question cannot be a building. There are various instances of wooden buildings, as for instance in Norway, where churches are frequently built of wood. It would be impossible to say that a church, if constructed of brick or stone, would be a building, but that, if constructed of wood, it would not be a building. Suppose that at some large engineering works a permanent structure were erected of brick to carry a crane for the purpose of lifting big guns or machinery: could it be said that such a structure was not a building? If such a structure is a building, I do not see how, as a matter of law, it can be laid down that a structure such as that in question cannot be a building because it is made of wood, and is only temporary. For these reasons I think the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. The argument for the employer really involves the conclusion that a structure cannot be a building for the purposes of the Workmen's Compensation Act, 1897, unless it is constructed of brick or stone. I see nothing in the Act to indicate any such limitation. The structure in question, which was being carefully built up to form the platform for an engine and crane, and was of a very

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substantial nature, may reasonably be said to be a building. I do not think the facts that it was built of wood, and not of brick or stone, and that it was only intended to be temporary, necessitate the conclusion in point of law that it could not be a building.

COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors for workman: *S. A. Clench & Co.*
Solicitor for employer: *H. B. Sewell.*

E. L.

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[IN THE COURT OF APPEAL.]

O'BRIEN *v.* DOBBIE & SON.

Employer and Workman—Compensation — Accident — Scaffolding — Ladder used as Scaffold—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman, employed on a building which was under repair and exceeded thirty feet in height, fell from a ladder, on one of the rungs of which he was standing for the purpose of doing work which was necessary on the building. The ladder had been used on previous occasions and on the same day for a similar purpose. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge held that the ladder was scaffolding within the meaning of the Act, and made an award in favour of the applicant. On appeal:—

Held, that there was no legal principle on which a ladder could be excluded from the category of possible scaffolding, and that, as there was evidence on which the county court judge could arrive at his conclusion of fact, the Court was bound by his finding.

APPEAL of the respondents from an award of the judge of the Liverpool County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who had been in the employment of the respondents, who were building contractors. The workman in the course of his employment was standing upon one of the rungs of a ladder in order to get at the work upon which he was engaged. He fell from the ladder and sustained injuries which caused his death. Upon the hearing of the application the judge gave judgment as follows:

"In this case my judgment will be for the applicant. I think it is made out to my satisfaction that the building was being constructed by means of a scaffolding. I think it is evident in this particular instance that the ladder was used as a scaffolding. It had been used before and on the same day for the same purpose, that is for the man to stand on and do some work which was necessary in the building, and in my opinion that constitutes it a scaffolding within the meaning of the Act."

An award was accordingly given in favour of the applicant, and the employers appealed.

Ruegg, K.C., and *Hugh Fraser*, for the employers. The question is whether a ladder by itself can come within the term "scaffolding" in s. 7 of the Act. The point was expressly decided in *Wood* v. *Walsh & Sons* (1), where A. L. Smith L.J. said: "The question has only to be put in order to be answered, for no man in his senses who wanted his house repaired by means of a ladder would say that he wanted it done by means of scaffolding; if he wanted scaffolding used he would say so." That statement was not affected by the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers & Co.* (2), though the decision of the Appeal Court in *Wood* v. *Walsh & Sons* (1) upon the question of "construction" was overruled. Lord Macnaghten in giving his opinion in *Hoddinott* v. *Newton, Chambers & Co.* (3) stated that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary significance, and the same principle is expressed in the opinions of the other Law Lords. Applying this principle to the word "scaffolding," it cannot be taken to include a ladder used by itself without anything in the way of planks or other additions. The converse point to that raised on this appeal, namely, that it is not possible to say as a matter of law that a ladder must be scaffolding, was before the Court in *Crowther* v. *West Riding Window Cleaning Co.* (4), and the finding that the ladder was not scaffolding was supported. Mathew L.J. in giving judgment said: "The ladder in this case no doubt was used, not

(1) [1899] 1 Q. B. 1009.
(2) [1901] A. C. 49.
(3) [1901] A. C. 49, at p. 57.
(4) [1904] 1 K. B. 232.

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merely as a means of ascending or descending, but in a way in which ladders often are used; and there is nothing, so far as I can see, in the Act to indicate an intention that a ladder so used should thereby be transmuted into a scaffolding." That is applicable to the present case, in which the judge has misdirected himself by assuming that a ladder per se is within the Act, and his award should not be supported.

[They referred to *Vezey* v. *Chattle* (1) and *Marshall* v. *Rudeforth*. (2)]

Tobin, K.C., and *W. Greaves Lord*, for the applicant, were not called on to argue.

Collins M.R. This case raises a question which has often been discussed in these cases, namely, whether a ladder can under any circumstances be deemed to be a scaffolding within the meaning of the Act. Now in this case the learned county court judge gave in his judgment the reason why he has arrived at the conclusion that the particular ladder in question was a scaffolding. He said: "In this case my judgment will be for the applicant. I think it is made out to my satisfaction that the building was being constructed by means of a scaffolding. I think it is evident in this particular instance that the ladder was used as a scaffolding. It had been used before and on the same day for the same purpose, that is for the man to stand on and do some work which was necessary in the building, and in my opinion that constitutes it a scaffolding within the meaning of the Act." We cannot interfere with the finding of the learned judge unless he has arrived at it through the medium of a misdirection.

Now has he misdirected himself in this matter? In order to say that he has misdirected himself we should be bound to affirm that under no circumstances can a ladder pure and simple without addition be a scaffolding, and if as a matter of law a ladder is afflicted with the incapacity of ever becoming a scaffolding, then the present appellants will be right in this case. We have said more than once before—certainly I have said it myself—that it is impossible, in view of the decisions of the

(1) [1902] 1 K. B. 494. (2) [1902] 2 K. B. 175.

House of Lords, to extract any principle from those decisions which would exclude a ladder per se from the category of possible scaffolding. I can conceive, I will not say a definition, but a description which I think might suffice to guide a jury, if the case were tried by a jury, in a matter of this kind. I agree that we must now take it that the question whether a particular arrangement is scaffolding or not is not purely and simply a question of fact—that is to say, a question of fact which a jury might be asked to decide without some guidance from the judge. It is the judge's duty to state approximately the conditions which would make the particular subject-matter come within or exclude it from the category of scaffolding. I think that cases can be put on the one side and on the other, which is about as near as one can generally get in trying to guide a jury on a mixed question of law and fact. I should think a practical direction would be that if it were found as a fact that a ladder was used exclusively for the purpose of giving access to and from a particular place, that ladder, so limited in its functions, ought to be held not to be a scaffolding. If, on the other hand, the ladder was used in the process of constructing or repairing a building exclusively or mainly for the purpose of permitting men to rise to a certain height, and from that height to carry out the work of repairing, so that the ladder served as a stand-point from which to do the repairing or constructing, I should think that the ladder might be properly found by the jury to be a scaffolding. In considering the modes of supplying a man with a basis above the ground itself for the purpose of carrying on his work, I am unable to exclude the system of two uprights with rungs connecting them from the category of possible scaffolding. I do not think the principles that guided the House of Lords in their decision, as far as I can understand them, exclude from the definition of scaffolding any arrangement whereby a person who has to do work or repair may be enabled to lift himself and sustain his position at a particular elevation, so as to enable him to carry on his work from that stand-point.

I cannot myself frame any definition which would exclude the arrangement which is commonly called a ladder, and I

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think it must be a question of fact—to what use had this particular arrangement been applied in the particular building. It may be that an isolated case of a particular man on a particular occasion standing upon a ladder would not be conclusive evidence that it had become a scaffolding. It seems to me that a jury might very well take into consideration, and ought to take into consideration, the purpose to which it is applied, not specially in an isolated instance, but having regard to the nature of the work to be done, whether it is there for the purpose of fulfilling the function of a scaffolding, and if that were the real purpose for which a ladder was used I should have thought a jury might very well find it was a scaffolding. If, on the other hand, it was not put there for that purpose, although accidentally on a particular occasion some one might have stood upon it while he was doing a certain amount of work, I think they might still be justified in holding that that ladder was not a scaffolding. That is as near as I can get to what might be deemed a direction to a jury in the matter.

In this case the learned judge has held with regard to this particular arrangement, whereby a person was able to do his work at a height which he could not reach from the ground, that he was using it solely for a purpose for which the arrangement of a board resting on trestles would have been a substitute, and probably equally effective; but the ladder had the facility of enabling him to adjust his work at the particular height indicated by the different rungs of the ladder. I think the learned judge was justified in finding in the circumstances of this case that the particular ladder used for that purpose, which had been used on the same day for the same or a similar purpose, was a scaffolding. That being so, the learned judge has arrived at his conclusion of fact without the medium of a misdirection, and, therefore, in my opinion, we cannot interfere with his decision, and this appeal must be dismissed.

Mathew L.J. I am of the same opinion. In determining the character of the particular structure the important question is the use to which it is put. Now to what use was the ladder put here? It was put to answer the purposes that might be

secured by a scaffolding, because the workmen did not have recourse to it merely to pass up and down; but it was put there, and intended to be used there, and was used there, as a support for the workman at a certain height from the ground to enable him to do part of the work that he had to do. Under those circumstances it seems to me that there is nothing in the cases that have been decided which precludes us from taking the view that there was evidence before the learned arbitrator that this structure was not being used merely as a ladder, but was being used for the additional purpose of affording support to the workman. I consider the question was one for him. It was first a question of fact, and, when the facts had been ascertained, there is no rule of law which precluded him from coming to the conclusion at which he arrived. A mixed question of law and of fact, as has been indicated by the House of Lords, is difficult to deal with. It appears to me it would introduce an entire novelty into the administration of justice if we held that a question of this description necessarily became a question of law. Our decision must be governed by the principle that, where there is evidence of fact on which a reasonable conclusion can be arrived at one way or the other, whether the case be before an arbitrator or a jury, the conclusion of either tribunal is binding upon us.

COZENS-HARDY L.J. I am of the same opinion. I doubt whether any great advantage can be secured by referring to decisions of this Court prior to the case of *Hoddinott* v. *Newton, Chambers & Co.* (1) in the House of Lords. Since that case it has been more than once argued here that as a matter of law a ladder is necessarily a scaffolding, although the county court judge has found in the particular case that it was not. Every such attempt has failed. The view of this Court has been that it is not solely a question of law; it is a question of mixed fact and law, and there was in each case evidence which justified the finding of the county court judge. To-day, and for the first time, the converse proposition has been put before us. We have been asked to hold that under no

(1) [1901] A. C. 49.

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circumstances can a ladder as a matter of law be a scaffolding. That seems to me to be an equally untenable proposition, and it should be dealt with exactly on the same grounds and in the same way, that is as a mixed question of fact and law; and if there was any evidence which justified the finding of the county court judge, it is not competent for us to interfere.

I desire not to repeat, but to adopt what has fallen from the Master of the Rolls, not as a precise and accurate definition, but as a useful guide in distinguishing one class of cases from another. I think the county court judge ought to have regard to that which was the prime object or intention with which the ladder was used. If the prime and main use was as a staircase, then primâ facie I should say it was not a scaffolding. If, on the other hand, the prime and main object was not to use it as a staircase, but as a sort of platform at various stages for doing works of construction or repair, then primâ facie I think it ought to be regarded as a scaffolding, subject only to this—that the mere occasional use by an individual workman of a ladder as in the nature of a platform, although for most purposes it is used as a staircase for transit, ought not to be sufficient to change the character of the user, and turn that which was a ladder into a scaffolding. I agree that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for applicant: *Helder, Roberts & Co., for John A. Behn, Liverpool.*

Solicitors for respondents: *Faithfull & Owen, for T. B. Eastley, Liverpool.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1905 Jan. 18.

PLANT *v.* WRIGHT & CO.

Employer and Workman—Workmen's Compensation—Construction of Building, What included in—Measuring up of Work when done—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

The employers of a workman had entered into a sub-contract for the execution by them of the plumbing work included in a contract for the erection of a factory, which exceeded thirty feet in height. It was necessary under the sub-contract that the plumbing work should be measured up when completed. At the time when the after-mentioned accident occurred, the plumbing work had been finished, though not measured up, but the construction of the factory was not complete, and steam-pipes were being fitted in it by means of a scaffolding. The workman, while employed in measuring up the plumbing work, sustained injury through an accident arising out of and in the course of that employment, in respect of which he claimed compensation under the Workmen's Compensation Act, 1897:—

Held, on the authority of *Frid* v. *Fenton*, (1900) 69 L. J. (Q.B.) 436, and *McCabe* v. *Jopling*, [1904] 1 K. B. 222, that, the measuring up of the plumbing work being incidental to part of the work of constructing the building, the workman was entitled to compensation under the Workmen's Compensation Act, 1897, as having been, at the time of the accident, employed by the undertakers on, in, or about a building which exceeded thirty feet in height, and was being constructed by means of a scaffolding, within the meaning of the Act.

Appeal against the award of the judge of the Birmingham County Court upon a claim for compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employ of the respondents, who were plumbers. The respondents had entered into a sub-contract for the execution by them of the plumbing work included in a contract for the erection of a factory made by a firm of builders, named Withall & Co., with building owners, named Rawlings & Co. The factory exceeded thirty feet in height. It appeared that it was necessary for the purposes of the contract entered into by the respondents that the plumbing work should be measured up when finished; and, in fixing the contract price, the amount which they would have to pay to

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their workmen for measuring up was taken into consideration. (1) The plumbing work having been finished, but not measured up, and the work of the builders having been substantially completed, Rawlings & Co. employed a firm named Danks & Co. to put up steam-pipes in the factory, which were a necessary part of it as a factory. Part of the tiling round the places where the steam-pipes were to be put in had been left incomplete. At the time of the after-mentioned accident the work of putting up the steam-pipes was being carried out by means of a scaffolding, which Danks & Co. had erected for that purpose. The plumbing work had then been finished for about a fortnight. While engaged, in pursuance of the respondents' directions, in measuring up the plumbing work in the factory, the applicant stumbled over an implement called a raker, which was there, and fell, sustaining injuries in respect of which he claimed compensation under the Workmen's Compensation Act, 1897.

In giving judgment the county court judge, after finding that the factory was being constructed at the time of the accident by means of a scaffolding, said that, that being so, the question arose whether the applicant was at that time "employed by the undertakers," within the meaning of the Act, which he thought must mean "employed in or about the construction"; that the question was "whether a man employed by the undertakers to measure up constructive work, when finished, was employed by the undertakers on, in, or about the building being constructed"; and, on the authority of *Frid* v. *Fenton* (2), he decided that the applicant was so employed, and was therefore entitled to compensation.

McCardie, for the respondents. In order to come within the Act, the applicant must have been employed on, in, or about a building exceeding thirty feet in height, which was

(1) It did not appear from the evidence why the measuring up was necessary, and the contract, which was stated to have been a lump sum contract, apparently was not produced; but the fact, which did appear, that the measuring up was to be paid for, would appear to indicate that it must have been necessary for the purposes of the contract.

(2) 69 L. J. (Q.B.) 436.

being constructed by means of a scaffolding, and must have been so employed by the undertakers as such, i.e., as persons undertaking the work of construction. The actual plumbing work, which was the work of construction in respect of which the respondents were undertakers, was finished before the accident happened. The builder's work was also really then finished; so that the whole of the work of construction, of which the plumbing work was a part, was completed. The county court judge held, on the authority of *Frid* v. *Fenton* (1), that the measuring up might be treated as part of the plumbing work, and therefore part of the work of construction. But that case and the case of *McCabe* v. *Jopling* (2), which was to the same effect, are distinguishable. It was held in these cases that the work of removing a scaffolding, after the actual work of building was completed, might be treated as part of the work of construction. That appears to be a reasonable view, because the work of the builder could not be looked upon as physically complete, if he were to leave the building surrounded by scaffolding. The plumbing work in this case could not be said to be incomplete, because the measuring up, which might not be done until months after the building was physically complete, had not taken place.

Furthermore, the putting up of the steam-pipes formed no part of the construction of the factory as a building. The scaffolding which was being used at the time of the accident was erected, not by Withall & Co. or by the respondents, for the construction of the building, but by Danks & Co. for the work of putting up the steam-pipes, which formed no part of the construction of the building. Therefore, it cannot be said that, at the time when the accident happened, the building was being constructed by means of a scaffolding. It does not appear that the scaffolding was used for the purpose of measuring up the plumbing work.

Cannot, for the applicant, was not called upon to argue.

COLLINS M.R. In this case the applicant was employed by the respondents, who had undertaken the plumbing work

(1) 69 L. J. (Q.B.) 436. (2) [1904] 1 K. B. 222.

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in a factory, which was being erected under a contract made by builders with the building owners. The building work under the contract was, at the time of the accident in respect of which the applicant claims compensation, nearly complete. I say nearly, because I wish to avoid the use of language which might imply that the construction of the factory as a whole and for all purposes was complete before the fitting in of the steam-pipes. The building being a factory, steam-pipes had to be fitted in, which involved the use of scaffolding, and that work was being done at the time when the accident happened. The actual plumbing work had been done for some time, but had not been measured up; and, under the contract, by which the respondents became the undertakers in respect of that work, they appear to have undertaken to measure up the work when completed; it appears to have been part of the work for which they were being paid, and must, I think, be deemed to have been a necessary step for the completion of that work. While the applicant was engaged in the process of measuring up the work, he met with an accident. The question is whether that accident can within the meaning of the Act be said to have arisen out of, and in the course of, employment by the undertakers on, in, or about a building, exceeding thirty feet in height, which was being constructed by means of a scaffolding. The first point taken is that, the plumbing work, in respect of which the respondents were undertakers, and likewise the building, so far as bricks and mortar were concerned, having at the time of the accident been finished, leaving only the measuring of the plumbing work and the fitting of the steam-pipes to be done, the applicant cannot be said to have been employed by the undertakers on, in, or about a building which was being constructed within the meaning of the Act. It has been held by this Court in the cases of *Frid* v. *Fenton* (1) and *McCabe* v. *Jopling* (2) that, where the erection of a building had been carried out by means of a scaffolding, the removal of the scaffolding was a part of the work of construction. Assuming the principle laid down in those cases to be sound, it appears to me to apply to

(1) 69 L. J. (Q.B.) 436. (2) [1904] 1 K. B. 222.

the present case. It seems to me that the work of measuring up the plumbing work in this case was as much ancillary to the main work of plumbing as the removal of the scaffolding was to the work of building in those cases. It was a piece of work which, as being a part of the plumbing work, which was admittedly part of the work of construction, came within the same category as did the removal of the scaffolding, as being part of the building work. If that be so, it disposes of the main point raised by this appeal. Another point was raised before us. It was said that the scaffolding which existed at the time of the accident was put up, not by the respondents for the purpose of the plumbing work, nor by the undertakers who contracted for the building work for the purposes of their work, but by the persons who had contracted for the putting up of the steam-pipes, which, it is contended, formed no part of the construction of the factory. I do not think that this point was really raised before the county court judge. The case seems to me to have been dealt with by him all through on the assumption that the scaffolding was being used for the construction of the building. From what he said, he appears to me clearly to have treated it as being used at the time of the accident for the purpose of completing the building, and I do not think the point now sought to be raised was ever brought to his mind. The terms of his judgment seem to me plainly to import that he was dealing with the case solely on the footing that the scaffolding, as regards its use for the purpose of fitting the steam-pipes, was being used for a necessary part of the process of constructing the building, in which case it would not matter by whom it was erected. Under these circumstances I do not think that the point now raised is open to the respondents. For these reasons I think the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. The first question is whether the measuring up of the plumbing work is to be regarded as part of the work of constructing the building. In my judgment it must be so regarded, it being manifest that, under the contract, it was intended that the work, when

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finished, should be measured up by the respondents before the contract price was paid. That being so, I agree that the principle of the cases to which the Master of the Rolls has alluded is applicable. From a business point of view, the measuring up is in such cases an essential part of the process of doing the work. With regard to the other point, I do not think the attention of the judge was ever really called to it; and he seems to have treated the case entirely on the basis that the scaffolding was, at the time of the accident, being used for the purpose of completing the construction of the building. I agree, therefore, that the appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion. I entirely agree with the conclusion arrived at by the county court judge, and the reasons given by him for that conclusion.

Appeal dismissed.

Solicitors for applicant: *Judge & Priestley, for P. Baker, Birmingham.*

Solicitors for respondents: *Ward, Bowie & Co., for T. W. Walthall, Birmingham.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1905
Jan. 20.

HARTLEY *v.* QUICK.

Employer and Workman—Workmen's Compensation—Building which exceeds Thirty Feet in Height—Extension of existing Building—Wall common to Two Buildings—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

The employer of a workman entered into a contract for the construction of a building by way of addition to an existing building, which exceeded thirty feet in height. The new building, when completed, was to form one building with the existing building, to be used as a station for generating electrical power; and for that purpose it was intended that the walls of the new building should be built into the end wall of the existing building, and that alterations should be made in that building. At the time when the after-mentioned accident happened, the new building was being constructed by means of a scaffolding, but no part of it had reached the height of thirty feet. Its walls had not been connected with that of the old building, but some of the footings for the walls were in actual contact with that building. The workman, while engaged in the building operations on the new building, sustained injuries from an accident arising out of and in the course of his employment, in respect of which he claimed compensation under the Workmen's Compensation Act, 1897:—

Held, that, the case being one of a new building by way of an extension of the old building, which involved alteration of that building, the workman might be regarded as having been employed about a building which exceeded thirty feet in height, and, therefore, was entitled to compensation.

APPEAL against the award of the judge of the Portsmouth County Court upon a claim for compensation under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman, who had been in the employ of the respondent, a builder and contractor. The respondent had contracted with the corporation of Portsmouth to erect a building on land belonging to them by way of addition to an existing building used by them as a station for generating electric power, which exceeded thirty feet in height. It was intended that the new building should, when complete, form one building with the old, and that the whole should be used as a station for generating electricity. The applicant,

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while working on the new building, which was being constructed by means of a scaffolding, sustained injuries through an accident arising out of and in the course of his employment, in respect of which he claimed compensation. At the time of the accident, the walls of the new building, which had not reached the height of thirty feet, had not been connected with the old building, but the trenches for the footings of the walls had been excavated right up to the end wall of the existing building, and some of the footings had been put in. No openings had then been made in the wall of the existing building for the purpose of communication between that building and the new one. The intention was, however, that the walls of the new building should be built into and joined on to the end wall of the existing building, and that that wall, which would become, when the whole plan was completely carried out, one of the main walls of both buildings, should have doorways cut in it, so as to afford access to and from one part of the entire building to the other. At the hearing before the county court judge, it was contended for the employer that the applicant was not at the time of the accident employed on, in, or about a building which exceeded thirty feet in height. The county court judge, in giving judgment, in substance said that he thought that the decisions in the cases of *Rixsom* v. *Pritchard* (1) and *Knight* v. *Cubitt & Co.* (2) could not be reconciled, and, therefore, the question might be looked upon as not being concluded by authority; that, the question being, under what circumstances employment on a building of less than the height of thirty feet, adjoining a building which exceeded that height, could be regarded as employment on or about a building which exceeded thirty feet in height, in his opinion the true test was whether any part of the building which exceeded thirty feet in height formed a necessary portion of the building which did not exceed that height; that, in the present case, the old and the new building were, when the latter was completed, to form one entire building used for the same purpose; and that, if the two buildings were intended ultimately to form one building,

(1) [1900] 1 Q. B. 800. (2) [1902] 1 K. B. 31.

or to form two buildings to which an existing wall would be common, absolute physical attachment of the one building to the other was not necessary, so long as the building operations were being carried on in connection with both buildings; and he therefore awarded compensation to the applicant.

Danckwerts, K.C., and *Minton-Senhouse*, for the employer. This case does not come within the decision in *Knight* v. *Cubitt & Co.* (1) That was the case of a party wall, a wall, which exceeded thirty feet in height, having formed the wall both of the building that was to be left standing and of the building that was being pulled down; and therefore it might be said that a part of the latter building which exceeded thirty feet in height still remained standing. The present case is one in which an altogether new building was being erected. At the time of the accident, the old building had not been really interfered with, nor had the walls of the new building been connected with it. The mere intention to interfere with it, or to use its wall for the new building, cannot be treated as constituting that building, at the time when the workman was employed upon it, a building which exceeded thirty feet in height, when in point of fact no part of it had reached that height. Whatever may have been the ultimate intention, the old and new buildings were in fact two buildings and not one building at the time of the accident. The county court judge speaks of them as two distinct buildings in his judgment. The county court judge was wrong in supposing that there was any conflict between the decision in *Rixsom* v. *Pritchard* (2) and that in *Knight* v. *Cubitt & Co.* (1) In *Rixsom* v. *Pritchard* (2) the buildings were independent buildings, and the party wall between them had only formed the wall of the building that was being demolished to a height of less than thirty feet. In *Knight* v. *Cubitt & Co.* (1) the party wall formed the wall of both buildings to a height of more than thirty feet. This case is really governed by the decision in *Rixsom* v. *Pritchard*. (2)

Ruegg, K.C., and *J. O'Connor*, for the workman. It is true that the learned county court judge did to some extent deal

(1) [1902] 1 K. B. 31. (2) [1900] 1 Q. B. 800.

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with the case as if it were a case of two independent buildings, and a common wall between them; but it is submitted that, on the facts proved and as found by the judge, it may be regarded from another point of view, and that, so regarding it, the applicant is entitled to compensation. It is clear from the case of *Hoddinott* v. *Newton, Chambers & Co.* (1) that an alteration of an existing building comes within the meaning of the term "construction" for the purposes of the Act. The building in the present case was really an extension of an existing building, which exceeded thirty feet in height. For the purpose of erecting it, the wall of the existing building had to be made use of; and the footings of the walls of the additional building had been brought into contact with the wall of the existing building. It was contemplated that there should be openings made in the wall of the existing building for the purpose of communication between the two parts of the building as extended. If the workman had, at the time of the accident, been engaged in making those openings, clearly he would have been employed on or about a building which exceeded thirty feet in height. It cannot make any difference that, instead of making the openings first, other parts of the work were being done. Under the circumstances it is submitted that the workman was employed, when he met with the accident, on or about a building which exceeded thirty feet in height, and therefore the case is brought within the Act.

Minton-Senhouse, in reply.

COLLINS M.R. In this case a claim for compensation is made by a workman, who was employed by the respondent in the work of building what has been described as an extension of an existing building used as electrical works. This building belonged to the corporation of Portsmouth; and they, being of opinion that the existing building was not large enough for their works, entered into a contract with the respondent for the enlargement or extension of it by building an annexe. In the process of building that annexe, the applicant met with the accident in respect of which he claims compensation.

(1) [1901] A. C. 49.

Before the county court judge the point was taken for the respondent that the employment of the applicant did not come within the Act, because it was not on, in, or about a building which exceeded thirty feet in height. I confess that I am not prepared to agree in all respects with the view taken by the learned county court judge in this case; but, looking at the substance of his decision, he has found in the result that the applicant was employed on, in, or about a building exceeding thirty feet in height; and, though I cannot altogether follow him in all the steps of the reasoning by which he arrived at his decision, I think we are entitled to affirm it, if we are satisfied with the conclusion at which the learned judge arrived, and are of opinion that, in point of law, the facts are sufficient to support it. In my opinion the facts do support the conclusion of fact that the applicant was working on, in, or about a building exceeding thirty feet in height. It seems to me that the evidence shews that the new building was really an extension of the old one. This is not a case in which a person is erecting a building in juxtaposition to a building which is the property of another owner. It is a case in which there is merely an extension of a building at the instance of the owner of that building, for the purposes of which extension it was contemplated that there would have to be an alteration of the existing building; and the judge has found that the necessary preliminary steps for the construction of the extension had been carried to the extent of actual contact with the existing wall of the building to be extended. The question, under the circumstances of this case, seems to be whether the applicant can be said to have been employed "about" a building exceeding thirty feet in height, which was being constructed by means of a scaffolding. In this case the existing building exceeded thirty feet in height. If the applicant had been employed by the owner of that building to make structural alterations in one of its walls, it could not have been doubted that his employment would have been on or about a building exceeding thirty feet in height. The interposition of a contractor to carry out the alteration of the existing building, in order to construct the extension, cannot

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make any difference. If this had been the case of an independent owner erecting an independent building by the side of an existing building, I should have had a doubt whether the workman could be said to have been employed about a building exceeding thirty feet in height, even although the new building would involve the use of the existing wall of the old building as a party wall. But, where, as here, the erection of a new building is being carried out by way of extension of an existing building belonging to the same owner, which exceeds thirty feet in height, and it involves structural alteration of the existing building, I think that a workman employed on the work may be said to be employed about a building exceeding thirty feet in height. Therefore I think that the decision of the county court judge may be supported. With regard to the reasons given by the county court judge, I cannot agree with him that the decisions in the cases of *Rixsom* v. *Pritchard* (1) and *Knight* v. *Cubitt & Co.* (2) are inconsistent with one another. It seems to me that there is no conflict whatever between them. But, although, if I rightly understand the view taken by the county court judge, I cannot agree with all the steps of his reasoning, on the grounds which I have stated I think that the conclusion at which he arrived was correct, and therefore the appeal must be dismissed.

MATHEW L.J. The question appears to me to be whether the workman in this case can be said to have been employed "about" a building which exceeded thirty feet in height. The county court judge does no doubt in some passages of his judgment speak of the original building and the new building as two buildings, but in other places he clearly treats the new building as in fact being merely an extension of the old; and, if that were so, I do not see how it could be treated as a separate and distinct building. I think that a workman employed upon such an extension of a building exceeding thirty feet in height, as the facts shew this to have been, must be regarded as having been employed "about" a building which exceeded thirty feet in height.

(1) [1900] 1 Q. B. 800. (2) [1902] 1 K. B. 31.

COZENS-HARDY L.J. I am of the same opinion. The question is whether the applicant can be considered as having been employed about a building which exceeded thirty feet in height. The learned county court judge seems to have thought that the decisions in *Rixsom* v. *Pritchard* (1) and *Knight* v. *Cubitt & Co.* (2) are irreconcilable. I have considered these decisions, and I cannot see any inconsistency between them. The real foundation of them appears to be that the question whether a wall is a party wall is one of fact and not of intention. A wall only becomes a party wall as having been used as such, and to the extent to which it has been so used. Where a house has been built against what was the party wall, the wall is none the less to be regarded as part of that house because the remainder of it has to a great extent been pulled down. If this had been a case in which an independent owner of adjoining land had contemplated erecting a building on his own land, and was merely intending for the purposes of that building to make such use of the wall of his neighbour's building as the law entitled him to make, speaking for myself, I do not think I should have seen my way to holding that that wall at the date of the accident could be said to have been the wall of the new building, which would therefore exceed the height of thirty feet, merely because there was an intention to use it as the outside wall of the new building. We are, however, not dealing with such a case. This case appears to be one, not of an independent building, but of the alteration or extension of an existing building; and I think that upon the facts we must hold that the applicant was employed at the time of the accident about a building which exceeded thirty feet in height.

Appeal dismissed.

Solicitors for applicant: *Pattinson & Brewer.*

Solicitors for respondent: *James, Mellor & Coleman, for Pink & Barnes, Portsmouth.*

(1) [1900] 1 Q. B. 800.

(2) [1902] 1 K. B. 31.

E. L.

1904
Dec. 21.

[IN THE COURT OF APPEAL.]

In re FRERE AND STAVELEY TAYLOR & CO. AND NORTH SHORE MILL COMPANY, LIMITED.

Practice—Appeal from Chambers—"Practice and Procedure"—Order for Statement of Case pending Arbitration—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 19.

An appeal will not lie direct to the Court of Appeal against an order of a judge at chambers directing an arbitrator to state a case pending an arbitration, the matter not being one of practice and procedure within the meaning of the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 4.

APPEAL against an order made by Jelf J. at chambers as after mentioned.

An action having been brought in the King's Bench Division by Messrs. Frere and Staveley Taylor & Co. against the North Shore Mill Company for damages for breach of contract, proceedings in the action were stayed on the application of the defendants under the 4th section of the Arbitration Act, 1889, upon the ground that the contract contained a submission to arbitration of any dispute which might arise under it. The matters in dispute were then referred to arbitration, and, in the course of the arbitration, certain questions of law were raised. Messrs. Frere and Staveley Taylor & Co. thereupon applied at chambers for an order that the arbitrator should state a special case for the opinion of the Court. The master made an order to that effect, which on appeal was affirmed by the judge.

Danckwerts, K.C. (*F. E. Smith* with him), for the respondents, took the preliminary objection that the appeal in such a case was to the Divisional Court, and not direct to the Court of Appeal. It was held by this Court in *Watson* v. *Petts* (1) that "practice and procedure" in the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 4, means practice

(1) [1899] 1 Q. B. 54.

and procedure in connection with a cause or matter in the High Court; and the decision in *Long* v. *Great Northern and City Ry. Co.* (1) is to the same effect. There is no question here of practice and procedure in a cause or matter in the High Court. The action is stayed, and it is impossible to look on the arbitration as a proceeding in that action.

J. A. Hamilton, K.C. (*G. D. Keogh* with him), for the appellants. The principle of the two cases cited is not applicable to the present case. In those cases the questions had to do with the practice and procedure in matters pending in inferior Courts, one being a question of prohibition to a county court and the other a matter relating to the proceedings in the sheriff's court. In this case there is an action pending in the High Court, which, though it is at present stayed, is not dead. The Arbitration Act, 1889, s. 19, gives the High Court a special consultative jurisdiction in arbitrations. It is submitted that an application for the exercise of that jurisdiction is a matter in the High Court, the practice and procedure in which comes within the terms of the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 4. In the case of *In re Portland Urban District Council and Tilley & Co.* (2) a matter analogous to the present was held by a Divisional Court to be a matter of practice and procedure within that Act. In other cases the Court of Appeal has, since the decision in *Long* v. *Great Northern and City Ry. Co.* (1), entertained appeals direct to that Court in cases analogous to the present; as, for instance, in *Rasch & Co.* v. *Wulfert* (3); but it must be admitted that the preliminary objection was not in those cases called to the attention of the Court.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Collins M.R. and Stirling L.J.) was delivered by

STIRLING L.J. We have considered the cases of *Watson* v. *Petts* (4) and *Long* v. *Great Northern and City Ry. Co.* (1), and we think that the principle upon which they were decided

(1) [1902] 1 K. B. 813.
(2) [1896] 2 Q. B. 98.
(3) [1904] 1 K. B. 118.
(4) [1899] 1 Q. B. 54.

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must apply to the present case; and therefore, in obedience to those decisions, we must give effect to the preliminary objection and dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *James Neal, for Evans, Lockett & Co., Liverpool.*

Solicitors for respondents: *Pritchard, Englefield & Co., for Simpson, North & Co., Liverpool.*

E. L.

C. A. 1905 *Jan.* 12, 13.

[IN THE COURT OF APPEAL.]

FRASER *v.* FRASER.

Practice—Appeal—Reference of Action to Master—Consent of Parties—Rules of Supreme Court, Order XIV., *r.* 7; *Order* XL., *rr.* 6, 6 (*a*); *Order* LIX., *r.* 3; *Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15.

When, under rule 7 of Order XIV., an action is, with the consent of the parties, ordered to be referred to a master, an appeal lies from his decision to a Divisional Court.

Decision of the King's Bench Division, [1904] 2 K. B. 245, reversed.

APPEAL from the decision of a Divisional Court. (1)

The question was whether an appeal lay from the decision of a master to whom the action had been referred by an order by consent under rule 7 of Order XIV. of the Rules of the Supreme Court.

The action was brought to recover commission on the sale of shares and for an account.

The writ was issued on April 8, 1903.

The defendant counter-claimed for money paid by him for the plaintiff.

The plaintiff applied for judgment under Order XIV.

On the hearing of the application on April 29, 1903, the master refused to give the defendant liberty to defend, and gave the plaintiff liberty to sign final judgment.

The defendant appealed to the judge, and on May 5, 1903,

(1) [1904] 2 K. B. 245.

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Phillimore J. discharged the order of the master and gave the defendant liberty to defend the action. And it was by consent further ordered, under Order XIV., r. 7, "that the action be referred to be decided by a master without pleadings."

The action was then tried by the master, and he, by his certificate dated May 26, 1903, found that the plaintiff was entitled to recover the sum of 925*l.* 1*s.* 11*d.*, and directed that judgment should be entered accordingly.

On May 27, 1903, judgment was entered accordingly.

The defendant gave notice of appeal to the Court of Appeal.

The Court of Appeal held (1) that in such a case an appeal did not lie direct to the Court of Appeal. But they left the question open whether an appeal lay to a Divisional Court.

The defendant then gave notice of appeal to the Divisional Court, asking that the finding and certificate of the master and the judgment might be set aside or varied, and judgment entered for the defendant on the claim and counter-claim, or alternatively that a new trial or reference might be had, or that the action might be remitted to the master for reconsideration, on the ground (inter alia) that the finding was against the weight of evidence.

The Divisional Court (Lord Alverstone C.J. and Wills and Kennedy JJ.) held (2) that the decision of the master in a reference under rule 7 of Order XIV. was final.

The defendant appealed. (3)

(1) [1904] 1 K. B. 56.

(2) [1904] 2 K. B. 245.

(3) Order XIV., r. 7: "Upon the hearing of the application (i.e., for judgment), with the consent of the parties, an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner."

Order XL., r. 6: "Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong: Provided that in the King's Bench Division such motion shall be made to a Divisional Court."

Rule 6 (*a*): "Rules 2 and 6 of Order XL. shall apply to a reference to any officer of the Court or special referee or arbitrator under an order of the Court."

By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14, "In any cause or matter (other than a criminal proceeding by the Crown),—(inter alia)

"(*a*) If all the parties interested who are not under disability consent: . . . .

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Hume-Williams, K.C., and *J. W. McCarthy*, for the defendant, repeated the arguments which they had used in the Divisional Court, referring also to *Lyon* v. *Morris* (1), *Gower* v. *Tobitt* (2), and *Wynne-Finch* v. *Chaytor*. (3) They contended that ss. 14 and 15 of the Arbitration Act, 1889, applied to a reference by consent under rule 7 of Order XIV., and that rules 6 and 6 (*a*) of Order XL. gave a right of appeal to a Divisional Court from the decision of the master. They relied also on the omission from the first branch of rule 7 of the words "without appeal" which occurred in the second branch.

W. Frampton, for the plaintiff, adopted the arguments used on the plaintiff's behalf in the Divisional Court.

He contended that the reference under rule 7 was an ordinary arbitration by consent, and that the object of the rule was to put an end to litigation at once. If there was to be an appeal on every case from a decision of an officer of the Court, rule 9 of Order XXXV., which provides that "any person affected by any order, finding, or decision of a district registrar may appeal to a judge," would have been unnecessary.

It was intended that there should be an appeal in the case of a compulsory arbitration, but not in the case of an arbitration by consent. Rule 3 of Order LIX. gave an express right of appeal to a Divisional Court from the award or certificate of an arbitrator or referee upon a question of law when a compulsory reference to arbitration had been ordered. There was no appeal to a Divisional Court from an order which had the same effect as the finding of a jury; in such a case, if there was any

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the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court."

By s. 15, "(1.) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct.

"(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury."

(1) (1887) 19 Q. B. D. 139.

(2) (1891) 39 W. R. 193.

(3) [1903] 2 Ch. 475.

appeal it was to the Court of Appeal direct. Rule 6 of Order XL. must be read in conjunction with rule 52 of Order XXXVI.

Trevor Lloyd, for garnishees of the plaintiff's interest.

J. W. McCarthy, in reply, as to the effect of rule 3 of Order LIX. That rule is now practically superseded. It was made before the Arbitration Act, 1889, was passed, and it applied to the Common Law Procedure Acts. Sects. 3 to 17 of the Common Law Procedure Act, 1854, are repealed by the Arbitration Act, 1889.

[ROMER L.J. That rule does not appear to be inconsistent with the second part of the Arbitration Act, 1889. It carries out those provisions for compulsory arbitrations.]

[*Clark* v. *Sonnenschein* (1) and *Munday* v. *Norton* (2) were also referred to.]

Cur. adv. vult.

Jan. 13. VAUGHAN WILLIAMS L.J. read the following judgment:—The question to be decided in this case is that which was left undecided by the Court of Appeal when this case was before them in 1904: see *Fraser* v. *Fraser*. (3) The question is whether, in a case in which an order is made under Order XIV., r. 7, referring an action to a master, there is any appeal against his decision. In *Fraser* v. *Fraser* (3) there was an attempt to appeal from the decision of the master by a direct appeal to the Court of Appeal, and the Court of Appeal held that an appeal did not lie to the Court of Appeal direct, but left open the question whether an appeal would lie to the Divisional Court. An appeal was then carried to the Divisional Court, and that Court has held that when an action is referred to a master under Order XIV., r. 7, no appeal lies from his decision, and we have now to consider whether that decision of the Divisional Court is right. This seems to depend on the construction to be put upon rule 7 of Order XIV., and in particular upon the words "referring the action to a master." The Divisional Court have held that the words "referring the action" mean referring the action to a master

(1) (1890) 25 Q. B. D. 464. (2) [1892] 1 Q. B. 403.
(3) [1904] 1 K. B. 56.

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as an arbitrator, and that therefore there is no appeal. Now, I agree that the expression "refer the action to a master," primâ facie, means a reference of the action to the master as an arbitrator, although it is to be observed that the appeal here is from a judgment. But I am not sure that I quite understand the reasoning upon which the conclusion is drawn, that therefore there is no appeal. It seems to me, having regard to the terms of ss. 14 and 15 of the Arbitration Act, 1889, that there are some cases of reference under an order of Court made by consent which fall within the operation of s. 15, and in which, according to my view, there is plainly a right of review. I think, therefore, that the judgment of the Divisional Court must mean that an order of reference made under rule 7 of Order XIV. is an order of reference made by consent by a judge's order in the sense in which such orders were made, independently of the Common Law Procedure Acts and the Judicature Act. It is common knowledge that, quite independently of any such Act, orders of reference by consent were made by order at Nisi Prius, or by rule of Court, or by judge's order, but that such orders could only be made when an action was pending, and could only be made by consent. Such orders were, in fact, submissions to arbitration embodied by consent in orders of the Court. The Divisional Court, as I understand, based their decision upon the ground that, according to the true construction of rule 7 of Order XIV., the reference to arbitration referred to in that rule is a reference of this character. I hesitate to come to this conclusion. It is plain that not every reference consequent upon an order made by consent is a reference of this character,—is a common law reference by consent by virtue of a submission embodied in an order; for it is plain that clause (*a*) of s. 14 of the Arbitration Act, 1889, covers orders of reference made by consent. And it is plain from the latter part of that section that it covers orders by consent of reference to an official referee or officer of the Court. And "officer of the Court" includes, in my opinion, a master of the Court. Moreover, *Gower* v. *Tobitt* (1), a decision of the Court of Appeal, shews that the decision of an official referee,

(1) 39 W. R. 193.

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and, I think, of a master of the Court, on a reference under an order made pursuant to s. 14 of the Arbitration Act, 1889, may be reviewed by a motion for a new trial made to a Divisional Court, and, in my opinion, this decision of the Court of Appeal covers equally the case of a decision under a reference of an action to a master, and the decision in *Wynne-Finch* v. *Chaytor* (1) seems to me to involve the same conclusion. Now, if the view which I have expressed is right, why should the Court construe the words of rule 7 of Order XIV. as if the reference therein referred to was a reference to a common law arbitrator embodied in an order made under the general power of the Court, embodying a submission to arbitration, rather than construe it as authorizing an order referring the whole cause to be tried by an officer of the Court? Why, in other words, should we treat the rule as authorizing an order embodying a submission rather than as an order providing a mode of trial? If we treat rule 7 as authorizing a mode of trial, then it is plain that rules 6 and 6 (*a*) of Order XL. apply, and that a motion to set aside the judgment will lie. This is the conclusion at which I have arrived, and, with unfeigned respect for the opinions of the judges of the King's Bench Division, I think I ought to give effect to my opinion, and hold that the decision of the Divisional Court was wrong. I may add that I think the omission of the words "without appeal" in the first limb of rule 7 goes to confirm my view.

ROMER L.J. and STIRLING L.J. concurred.

Appeal allowed.

[The appeal was remitted to the Divisional Court.]

Solicitors: *Neville, Fisher & Co.; R. Barnes; Gerald & Arthur Marshall.*

(1) [1903] 2 Ch. 475.

W. L. C.

1904
Aug. 9.

In re A DEBTOR.
Ex parte THE DEBTOR.

County Court—Judgment Summons—Jurisdiction to make Receiving Order in lieu of Committal Order—Absence of Evidence of Means—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 5.

The jurisdiction given by s. 103, sub-s. 5, of the Bankruptcy Act, 1883, to a county court judge having bankruptcy jurisdiction, upon the hearing of an application under s. 5 of the Debtors Act, 1869, for the committal of a judgment debtor, to decline to commit and in lieu thereof to make a receiving order against the debtor, cannot be exercised if there is no evidence of the debtor's means before the county court judge.

Reg. v. *Sussex County Court Judge*, (1888) 59 L. T. 32, considered and distinguished.

APPEAL from a decision of the judge of the Canterbury County Court.

Judgment having been recovered against the debtor for 39*l.*, a judgment summons was eventually taken out by the judgment creditors against the judgment debtor. No affidavit of means to pay was filed on behalf of the judgment creditors. At the hearing of the judgment summons the judgment debtor did not appear, nor was he represented, and the learned county court judge, without having any evidence of means before him, asked the solicitor to the judgment creditors if he would take a receiving order in lieu of a committal order; the solicitor assented, and the judge, acting under s. 103, sub-s. 5, of the Bankruptcy Act, 1883 (1), accordingly made a receiving order against the judgment debtor. The judgment debtor appealed.

Frank Mellor, for the judgment debtor. The order was bad. By virtue of s. 5, sub-s. 2, of the Debtors Act, 1869, the jurisdiction to make a committal order can only be exercised

(1) By 46 & 47 Vict. c. 52 (The Bankruptcy Act, 1883), s. 103, sub-s. 5, "Where, under s. 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor."

where it is proved to the satisfaction of the Court that the debtor has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he is in default; the county court judge could not therefore, in the absence of evidence of means, have made a committal order against the judgment debtor. The power given by s. 103, sub-s. 5, of the Bankruptcy Act, 1883, is to make a receiving order "in lieu of" a committal order, and it is impossible to make an order "in lieu of" another order which there is no jurisdiction to make. The decision in *Reg.* v. *Sussex County Court Judge* (1) is apparently against the contention of the judgment debtor; but that case is distinguishable on the ground that the judgment debtor had had means to pay, but had voluntarily deprived himself of them by making an assignment of his property; the judge, therefore, could in that case exercise the discretion which it was obviously intended by s. 103, sub-s. 5, that he should possess, but which in the present case it was impossible for him to exercise, as, in the absence of evidence of means, there was no jurisdiction to make a committal order. The judgments of the Court of Appeal in *In re Clark, Ex parte Clark* (2), support the view that the jurisdiction to make a receiving order in lieu of a committal order only arises where there is jurisdiction to commit. [He also referred to Williams on Bankruptcy, 8th ed. p. 331.]

G. Condy, for the judgment creditors. The decision in *Reg.* v. *Sussex County Court Judge* (1) has never been questioned and is binding on this Court; it is indistinguishable in principle from the present case, for if the jurisdiction can be exercised where the judge is satisfied that the judgment debtor has no means, a fortiori it can be exercised where there is no evidence of means one way or the other.

BIGHAM J. I am of opinion that this appeal should be allowed. The question for our determination is whether under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, the county court judge had power to make a receiving order against the debtor: that depends upon the language of the sub-section, and almost

(1) 59 L. T. 32. (2) [1898] 1 Q. B. 20.

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entirely upon the words "in lieu thereof" as there used. In order to ascertain the proper meaning to be placed upon that expression, it is necessary to turn to s. 5 of the Debtors Act, 1869, which provides that "any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment." Then follows a proviso that the jurisdiction is only to be exercised subject to certain restrictions, which are set out in the section, the important part of which for the present purpose is sub-s. 2, which provides that "such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same." Therefore, although a county court judge has this jurisdiction given him by the Act, it is provided that he shall not exercise it unless there are materials before him to enable him to form an opinion whether the debtor has means to pay. There was no such material before the county court judge in the present case; he was not, therefore, in a position to exercise his jurisdiction under the Act. Turning again to s. 103, sub-s. 5, we find it enacted that "the Court may, if it thinks fit, decline to commit, and in lieu thereof . . . . make a receiving order against the debtor." In my opinion that contemplates a case where a judge has jurisdiction to make a committal order, and also has materials upon which to exercise that jurisdiction; and it is only in such a case, where he has materials before him upon which a committal order may be made, that he has jurisdiction to make a receiving order "in lieu of" committing the debtor to prison. I think that the present case does not fall within s. 103, sub-s. 5, and that this appeal must be allowed.

DARLING J. I agree. My only difficulty arises from the decision in *Reg.* v. *Sussex County Court Judge.* (1) It is clear,

(1) 59 L. T. 32.

however, that in that case the judge might, if he had chosen, have made a committal order; the debtor had had means, but on the same morning on which judgment was obtained he had made an assignment of his property for the benefit of his creditors generally; the judge, therefore, found that though he had had means which would have justified the making of a committal order, he had since parted with them, and that, therefore, he ought to exercise his jurisdiction to make a receiving order instead of committing the debtor to prison. The distinction between the two cases is that there the judge had evidence before him which would have justified the making of a committal order, whilst in the present case he had no such evidence. The learned county court judge could not make a committal order, for he had not before him the necessary evidence of means; and in my opinion he could not make a receiving order "in lieu of" an order that he could not make and which, in fact, could not exist. The difficulty is that in our present decision we are making the right to make a receiving order in lieu of a committal order depend on whether or not there is evidence of means, which Wills J. in *Reg.* v. *Sussex County Court Judge* (1) said was not a reasonable construction of the statute. I think, however, that that expression of opinion was unnecessary to the decision of that case, as the county court judge had had evidence of means before him.

Appeal allowed.

Solicitors for appellant: *Arnould & Son, for Rook, Folkestone.*

Solicitors for respondent: *Storey, Cowland & Hill, for Watts & Watts, Folkestone.*

(1) 59 L. T. 32.

W. J. B.

C. A.
1904
Dec. 2, 3.

[IN THE COURT OF APPEAL.]

THE KING *v.* JUSTICES OF KENT.

Highway—Proceedings for Diversion—Certificate of Justices—Period for which Notice must be affixed at Ends of Highway—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 84, 85.

In proceedings for the diversion of a highway under s. 85 of the Highway Act, 1835, it is not a condition precedent to the validity of a certificate of justices under that section that the notice of proposed diversion, which is thereby required to be affixed at each end of the highway intended to be diverted, should be first so affixed at such a date as to leave a period of twenty-eight days between the date of the affixing of the notice and the date of the issue of the certificate.

Decision of the King's Bench Division, [1904] 2 K. B. 349, reversed.

APPEAL from a decision of the Divisional Court making absolute a rule for a certiorari to quash a certificate of justices in proceedings for the diversion of a highway and order of quarter sessions directing the enrolment of the same. The decision is reported [1904] 2 K. B. 349. The facts giving rise to the application were as follows.

On April 25, 1903, certain persons of the name of Abrey and Isard, by a notice in writing addressed to the urban district council of Tonbridge, in the county of Kent, and to their clerk, gave notice that they were the owners of certain land called the Blue Barn estate and were desirous of diverting a certain footpath and substituting therefor another and more commodious highway across the Blue Barn estate, and requiring the clerk to summon a meeting of the council and submit their proposal to the council. On July 1 a resolution of the council was passed directing their surveyor to apply to two justices to view the highway proposed to be diverted. On July 3 the surveyor applied to Messrs. C. F. Kemp and R. Wingate, two justices of the peace, to view the highway. They did view, and with the result that they refused to certify that the proposed substituted way was more commodious to the public. On November 9, without any fresh application by

Messrs. Abrey and Isard to the district council, or any fresh resolution by the council in that behalf, the surveyor applied to two other justices, Messrs. A. T. Beeching and H. R. Brown, to view the highway. On November 11 the last-named justices viewed, and directed the surveyor to affix the necessary notice of diversion at the side of the highway and to advertise the same in the newspaper as required by s. 85 of the Highway Act, 1835. (1) On November 14 the surveyor affixed the notice at the side of the path. The notice was dated

(1) By 5 & 6 Will. 4, c. 50 (The Highway Act, 1835), s. 84, "When the inhabitants in vestry assembled [now the district council] shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or reserving a bridle-way or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act: provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this Act; and the said surveyor is hereby required to make such application as aforesaid."

Sect. 85: "When it shall appear upon such view of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted . . . . so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand . . . . the said justices shall direct the surveyor to affix a notice in the form, &c. . . . . at the place and by the side of each end of the said highway from whence the same is proposed to be . . . . diverted . . . . and also to insert the same notice in one newspaper published or generally circulated in the county . . . . for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church, &c. . . . . on four successive Sundays next after the making such view; and the said several notices having been so published and proof thereof having been given to the satisfaction of the said justices . . . . the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public."

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November 11, and stated that the justices' certificate would be lodged with the clerk of the peace on December 7. He also inserted a similar notice in a newspaper called the *Tonbridge Free Press*, which is published in Tonbridge on Saturdays and is circulated in the district. The notice appeared in the issues of that newspaper on November 14, 21, and 28, and December 5. A similar notice was affixed on the church doors on Sundays, November 15, 22, and 29, and December 6. On Monday, December 7, the justices issued their certificate, which on the same day was lodged with the clerk of the peace. The certificate stated that the justices making it had viewed the highway proposed to be diverted and also the proposed new highway, and that upon the view they found the new highway would be more commodious to the public for the following reasons: "Because the said old highway is a mere footpath across an open field which is very wet and muddy in winter and very inconvenient . . . . whilst the proposed new highway will be of the uniform width of six feet and will be formed with a solid bottom and with a three-inch top course of tar paving. It is understood that such six-foot footpath will eventually form part of a new thirty-six foot roadway to be ultimately lighted and taken over by the urban district council of Tonbridge." The certificate recited that Messrs. Abrey and Isard were the owners of the Blue Barn estate, but did not state that they were the owners of the land on which the proposed new highway was to be made. The justices, however, at the time of making the certificate had before them depositions which shewed that the site of the new highway was parcel of the Blue Barn estate. The certificate having been issued, a Mr. Eastwood and the Tonbridge Rural District Council appealed to the quarter sessions against the certificate and the order for diversion. On January 7, 1904, the appeal was heard, when the quarter sessions dismissed the appeal and ordered the certificate to be enrolled. The appellants obtained a rule for a certiorari to quash the certificate and the order of quarter sessions upon the grounds (amongst others)—that after the refusal of the first two justices to certify, no other justice could issue a certificate without a fresh resolution of the district

council directing the surveyor to request such justices to view; that there was no sufficient proof before the justices of a consent by the owners of the land to the substituted highway being made; that s. 85 was not complied with in respect to notices either at the ends of the highway, or on the church doors, or in the newspaper; and that the reasons given by the justices in their certificate for determining that the new footpath would be more commodious were insufficient and bad.

The Divisional Court (Lord Alverstone C.J., Wills and Kennedy JJ.) made absolute the rule for a certiorari upon the ground that the notice to be affixed by the surveyor at the ends of the highway proposed to be diverted must be so affixed by him at a date which would leave an interval of twenty-eight days between the affixing of the notice and the issue of the certificate of justices. The justices appealed.

Macmorran, K.C., and *R. Cunningham Glen*, for the appellants. The appeal is confined to the only point that was decided against the appellants in the Court below, that is, as to the time during which the notice affixed at the ends of the highway should remain up. The direction in s. 85 of the Highway Act, 1835, as to affixing such a notice contains no provision as to the time during which it is to be maintained. That direction is followed by directions as to publication of the notice in a newspaper and upon the church doors, but these are wholly independent requirements. The provisions as to insertion of the notice in a newspaper (which may be a weekly newspaper) for four successive weeks, and as to its publication on the church door for four successive Sundays, can obviously be satisfied, though a period of less than twenty-eight days may elapse between the view of the justices and the issue of the justices' certificate. Apart from the fact that on a grammatical construction of the section the provisions as to four successive weeks do not relate to the notice at the ends of the highway, it is difficult to see why those provisions should be treated as though they related to whole weeks, so as to raise an implication that a period of twenty-eight days is required in any case. In the present case the notice at the

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ends of the highway was in fact up concurrently with the other notices for a period of twenty-three days.

Danckwerts, K.C., and *Hohler*, for the respondents. First, the mandate of the surveyor was spent when the first two justices refused to certify, and the proceedings should have been commenced de novo by a fresh application to the district council: *Davison* v. *Gill.* (1) Secondly, as to the time during which the notice is to remain up at the ends of the highway, if there is no such limitation as is suggested by the respondents, it follows that merely affixing the notice for five minutes would be a sufficient compliance with the requirements of the section. This, however, would entirely stultify the object of the Legislature, which, as was pointed out by Blackburn J. in *Reg.* v. *Surrey Justices* (2), was not only to secure that every one interested in the preservation of the highway should be aware of what was about to be done before it was done, but also to secure to every one who comes upon the highway the opportunity of reading the notice. There is nothing in the language of s. 85, when grammatically construed, to prevent the period of four successive weeks from applying to the publication of the notice at the ends of the highway; and, that being so, publication during four successive weeks cannot be certified until after the expiration of a period of twenty-eight days. Thirdly, there was no sufficient proof before the justices of the consent of the owners of the land through which the substituted highway was to pass, and the fact of their consent was not recited in the certificate.

[They cited on this point *Reg.* v. *Worcestershire Justices* (3); *Reg.* v. *Harvey.* (4)]

Lastly, the reasons given in the certificate for determining that the new highway would be more commodious were not stated to be derived from the view; they were therefore bad.

[On this point they cited *Reg.* v. *Wallace.* (5)]

Macmorran, K.C., was called on to reply as to the second point only.

(1) (1800) 1 East, 64.
(2) (1870) L. R. 5 Q. B. 466, at p. 471.
(3) (1854) 3 E. & B. 477.
(4) (1874) L. R. 10 Q. B. 46, 50.
(5) (1879) 4 Q. B. D. 641.

COLLINS M.R. This appeal turns upon a very technical point arising on the construction of s. 85 of the Highway Act, 1835, by which certain conditions are imposed upon the granting of a certificate by justices authorizing the stopping up or diverting of a highway; the only question for us to consider is whether one of the conditions there imposed has been so performed as to satisfy the requirements of the section. [The Master of the Rolls read the section.] I assume that all the other conditions were fulfilled as to which contentions were raised here or in the Court below except the particular condition which the Divisional Court held had not been fulfilled—that is, the condition as to affixing a notice "at the place and by the side of each end of the highway from whence the same is proposed to be . . . . diverted." There is no doubt that a notice was in fact put up which in its terms was in accordance with the requirements of the section; but in the notice itself a day within four weeks from its date was named as the day on which the certificate of the justices would be given, and it was contended in the Divisional Court and is contended here that unless the notice was left up for twenty-eight days the condition upon which the certificate could be given had not been complied with, and the proceedings consequently failed. This depends upon whether any provision is to be found in the section, not merely for affixing the notice, but for its maintenance for twenty-eight days; if such an obligation is to be found, the judgment appealed from is correct and must be affirmed. But when the section is carefully looked at, nothing of the kind is to be found there. The expression used is "affix," not "affix and maintain," and no provision as to the time during which the notice is to be maintained can be grammatically extracted from the language used. I pass on to other provisions of the section. The surveyor is to insert the same notice in a newspaper published or generally circulated in the county for four successive weeks after the justices have viewed the highway—a provision which seems to have caused no difficulty to the learned judges in the Divisional Court, who thought that the requirement of the section was satisfied by the advertisement appearing four times in a weekly paper.

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Then he is to affix a like notice on the church door on four successive Sundays after the view, which was done; at any rate, the notice was affixed to the church door and remained there for four successive Sundays. The section then provides that "the said several notices having been so published," and certain proof have been given, the justices are to give their certificate; and it is clear to me that the words "the said several notices having been so published" must mean that the notice must have been affixed at the ends of the highway (there being no provision for the time it is to remain there), and that the provisions as to the insertion of the advertisement and the affixing of the notice on the church door must have been complied with: those are the requirements that cannot be dispensed with. I do not think it is possible to apply to the notice that is affixed at the ends of the highway the same conditions that are imposed by the section upon the advertisement and the affixing of the notice to the church door. We should be reading into the Act of Parliament that which is not in it if we were to hold that it was not complied with because the day mentioned in the notice as that on which the justices' certificate would be lodged with the clerk of the peace was within twenty-eight days of the date of the notice itself. With the greatest respect for the opinion of the learned judges in the Court below, I think that we have no alternative but to differ from them, and to hold that it is not a condition precedent to the validity of the justices' certificate that the notice affixed at the ends of the highway proposed to be diverted shall have been kept affixed for four weeks.

STIRLING L.J. I am of the same opinion and for the same reasons; but as we are differing from the view taken by three learned judges for whose opinion I entertain the highest respect, I will state shortly the grounds of my decision. The question is whether the proper procedure has been pursued in proceedings taken to obtain the sanction of justices to the diversion of a highway. Under s. 84 of the Highway Act, 1835, there must be a view of the highway by two justices, and s. 85 deals with what is to happen after the view. If

upon the view it appears that the highway may be diverted so as to make it nearer or more commodious to the public, and if the owner of the land gives his written consent, the justices are to give certain directions to the surveyor with which I will deal in a moment, and after these directions have been given and certain notices published the justices are to give their certificate, which is to embody certain matters specified in the section.

The question before us really is at what date the justices may, after having viewed the highway, resume their consideration of the matter and proceed to give their certificate: any limit as to the time must be a limit imposed by the statute. The justices are to direct the surveyor to do three things: first, to affix a notice at the points of diversion of the highway; secondly, to insert the same notice in a local newspaper; and, thirdly, to affix a like notice on the church door. It is quite clear that the notice must be inserted in one newspaper: whether that must be a daily or weekly one is not stated, but I think that insertion in a weekly paper is a compliance with the section; that insertion is to be for the four successive weeks next after the view; the affixing of the notice on the church door is also to be for four successive Sundays. As far as these two requirements are concerned, neither of them involves the suspension for twenty-eight days of the proceedings for obtaining the justices' certificate; such a suspension is not necessarily the result of insertion of a notice for four weeks in a weekly newspaper, or of its publication on the church door on four successive Sundays, both of which may be accomplished within a less period of time. It is contended, however, that the provision which requires the notice to be affixed at each end of the proposed diversion also requires it to remain there for a period of four successive weeks from the date of the view; but does the section impose any such obligation? I am unable to see that any such requirement is to be extracted from the ordinary grammatical construction of the language used. The only requirement is that the notice must be affixed at the points of diversion, and then the section goes on to require the insertion of the notice in a newspaper for four

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successive weeks; it is contended for the appellants that the provision as to the four successive weeks is to be read also with the provision for affixing the notice at the highway. That is certainly not the grammatical meaning of the words; one does not affix a notice for four weeks, but once for all; besides, the section does not say that the notice is to remain affixed for four weeks, and although I agree that the terms or conditions on which the jurisdiction to divert a highway is conferred by Act of Parliament must be strictly complied with, we are not justified in subjecting the exercise of that jurisdiction to terms not imposed by the statute. I think, therefore, that the justices cannot resume consideration of the proposed diversion until the period of time allowing of the insertion of proper advertisements and of proper publication of the notice on the church door has expired, but that no definite limit of time is imposed for the retention of the notice at the side of the highway. It is to be presumed that the justices were satisfied by proper proof of the publication of the notice, and that the publication extended over a period of more than three weeks; but there is no reason in the nature of things why the publication of the notice should continue for four weeks.

MATHEW L.J. I am of the same opinion. It is clear that the respondents have no merits, and that the objection is purely technical; but it is said that the diversion of a highway involves the taking away of a public right, and that the statute must be construed strictly against the parties who obtain, and justices who give, a certificate for the diversion. The object of the Act, however, is to enable persons to provide a better road for the use of the public, and where this would be the result of a diversion I think that the certificate of the justices ought, if possible, to be upheld in the public interest. I think that the technical objection which it is sought to read into the section is wholly untenable. Nothing in the Act of Parliament requires the notice at the side of the highway to be maintained for four weeks—a requirement which could not in practice be complied with. I am satisfied that the requirement is met by the putting up of the notice, and that its remaining for the

whole period of twenty-eight days is not required by the section. The provisions with regard to the advertisement of the notice in the newspaper and its publication on the church door can each be complied with in less than four weeks, but yet it is contended that a full period of four weeks is necessary for the publication at the side of the highway. I cannot see any foundation for such a contention, and I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Neve, Beck & Kirby, for Neve & Williams, Tonbridge.*

Solicitors for respondents: *Collyer-Bristow & Co., for Stone, Mason & Simpson, Tonbridge Wells.*

W. J. B.

In re AN ARBITRATION BETWEEN KATE SCARR AND THE GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED.

1904 *Dec.* 16, 21.

Insurance—Accident—Policy— Construction—Injury caused by "Violent, Accidental, External and Visible Means"—Death from Heart Failure brought on by Physical Exertion.

A policy of insurance provided for the payment of a sum by the insurers in case the assured should "sustain any bodily injury caused by violent, accidental, external and visible means," and the injury so sustained should be "the sole and immediate cause of death of the assured" within three months of the occurrence of the accident. The assured died on January 25, 1904, whilst the policy was in force, the following circumstances having led up to his death: On the morning of December 26, 1903, he was in the apparent enjoyment of good health and able to discharge the duties of his employment, which were duties requiring some bodily activity. In fact, however, on that day and for a considerable time prior thereto his heart was in a weak and unhealthy condition, although he did not know that fact. During the morning of December 26, being apparently in his usual state of health, he attempted to eject a drunken man from his master's premises, using some physical exertion for that purpose by pushing or pulling in order to overcome the man's passive resistance. The effect of this physical exertion was to cause a strain on the assured's heart, and the increased work of the heart under this strain rendered it, owing to its weak and unhealthy state, incapable of recovering its ordinary condition when the immediate strain ceased, the consequence

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being that the heart began to dilate, and the dilatation so set up was the cause of death. But for his exertions in attempting to eject the drunken man the assured might have lived a considerable time longer. A claim to receive the policy moneys having been made by the assured's personal representative:—

Held, that the injury which resulted in the death of the assured was not caused by "accidental means" within the meaning of the policy, and the insurers were, therefore, not liable.

SPECIAL CASE stated by an arbitrator under a policy of insurance against accidents.

The policy was effected by R. T. Scarr with the General Accident Assurance Corporation, Limited, and provided that, if at any time during the continuance of the policy the assured "shall sustain any bodily injury caused by violent, accidental, external and visible means within the meaning of this policy and the conditions hereto, and such injury shall be the sole and immediate cause of death of the assured within three calendar months from the occurrence of the accident, then . . . . the funds and property of the corporation shall be liable to pay his legal representatives the sum of 500*l*." Clause 4 of the conditions provided that the policy should not extend to cover death "arising from any natural disease or weakness or exhaustion consequent upon any disease . . . . although accelerated by accident."

Scarr died, under the circumstances hereinafter stated, on January 25, 1904, and Kate Scarr, his legal representative, claimed 500*l*. from the corporation as being due under the policy. The corporation disputed the claim, and the dispute was referred to arbitration under the terms of the policy, except that by consent one arbitrator was appointed in lieu of two arbitrators and an umpire.

The arbitrator at the request of the parties made his award in the form of a special case, which stated the following facts and findings of fact:—

Scarr was at the time of his death in the employment of a firm of maltsters as their manager. At the time of his death the policy was in full force and effect, and all premiums had been paid thereon, and Kate Scarr was entitled to receive the policy moneys subject only to the question in dispute between

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the parties whether his death was a death rendering the corporation liable under the terms of the policy.

Paragraphs 3, 4, and 5 of the award were as follows :—

"3. The said R. T. Scarr was at the time of the happening of the matters hereinafter stated a stout heavily-built man aged fifty-three, but not of any abnormal size or weight. He was in the apparent enjoyment of good health, and was able to, and did, discharge the duties of his employment (which involved a good deal of walking, ascending and descending upright iron ladders, and other outdoor exercise) without any complaint or heart trouble; nor was his wife or his medical attendant, nor any one of his friends, aware that his heart was in any way affected. His medical attendant had in fact, in July, 1903, sounded and examined his heart without detecting anything wrong.

"4. On December 26, 1903, the deceased, R. T. Scarr, was at the malting premises where he was employed at about 9.30 to 9.45 A.M., being apparently in his usual state of health. There was upon the premises a man who was more or less drunk, and the deceased attempted to eject him, using some physical exertion for that purpose by pushing or pulling in order to overcome the drunken man's passive resistance. The effect of this physical exertion was such that he immediately returned home and sent for a doctor, complaining of a pain in the region of his chest. No dilatation of the heart or other symptoms of heart trouble could at that time be detected by stethoscope or any other examination, nor did a similar examination by another medical man some six hours later shew any such symptom. The pain, however, continued, and on a third stethoscope examination about 9.30 P.M. the same evening it was found that his heart was seriously dilated, there being a 'murmur' at all the valves, and that his pulse had gone up from 75 to 120. The condition of the deceased never afterwards improved, and, on January 25, 1904, he died. A post-mortem examination was made at which three medical men were present, who all gave evidence before me. Evidence was also given at considerable length by a medical expert of great experience in cases of heart disease, but

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who was not present at the post-mortem, and also by other witnesses as to the habits and physical condition of the deceased in his lifetime.

"5. On the evidence above referred to I have arrived at the following findings of fact relative to the death of the deceased:—

"(i.) The heart of the deceased was on and prior to December 26, 1903, in a weak and unhealthy condition—that is to say, there was some fatty degeneration and some hypertrophy or increased size. This condition had arisen progressively and was of considerable standing. The effect of this condition was to diminish the elasticity and power of the tissue of the heart (which is chiefly muscular tissue), and to render it less capable of working under strain, or of recuperating itself as such strain ceased. The condition of heart above described was not readily discoverable by the stethoscope, and was consistent with fair capacity for the ordinary duties of the man's life.

"(ii.) The effect of the physical exertion used by the deceased on the morning of the 26th of December was to make a call or demand on the heart to work harder, and to pump blood at an increased rate. The effect of the increased work done by the heart under this strain was to produce pain in its muscular tissue, spoken of by the medical expert as analogous to muscular cramp.

"(iii.) The state of the muscular tissue of the heart described under (i.) rendered it incapable of recuperating and recovering its ordinary condition when the immediate demand or strain ceased, and the pain and irritable condition of the heart continued in consequence. After some hours the heart began to dilate by reason of this condition, and the dilatation so set up was the cause of death by rendering the valvular action of certain valves of the heart inefficient and imperfect.

"(iv.) Had it not been for the events which happened on the 26th of December the deceased would not have died when he did, humanly speaking, and might have lived a considerable time."

It was contended on behalf of the personal representative of the deceased that his death resulted from accidental injury

or strain to the heart, and that the corporation were liable on the policy, citing *Hamlyn* v. *Crown Accidental Insurance Co.* (1) It was contended on behalf of the corporation that there had been no accident—i.e., no "violent, accidental, external and visible means" causing injury; that there had been no bodily injury; that, even assuming an injury resulting from an accident, it was not the sole immediate cause of death, and that the corporation were in any event protected by the fourth condition of the policy.

If the Court should be of opinion that the corporation were liable on the above statement of fact, then judgment was to be entered for the personal representative of the deceased for 500*l.* and her costs of the arbitration and award.

If the Court should be of opinion that the corporation were not liable, then judgment was to be entered for the corporation for their costs of the arbitration and award.

Herbert Smith (*W. Trevor Turton* with him), for the claimant.

Wallace, K.C. (*McGillivray* with him), for the insurance company.

Counsel for each of the parties took the same points as were taken before the arbitrator. *Isitt* v. *Railway Passengers' Assurance Co.* (2); *Hamlyn* v. *Crown Accidental Insurance Co.* (1); *Anderson and Others* v. *Scottish Accident Insurance Co.* (3); *Fetter* v. *Fidelity and Casualty Co.* (4); *Horsfall* v. *Pacific Mutual Life Insurance Co.* (5) were cited for the claimant; and *Clidero* v. *Scottish Accident Insurance Co., Ld.* (6); *Appel* v. *Ætna Life Assurance Corporation* (7), for the insurance company.

Cur. adv. vult.

Dec. 21. BRAY J. read the following judgment:—This is a claim by the executrix of a Mr. Scarr for 500*l.* alleged to be due under a policy of insurance effected by Mr. Scarr with the General Accident Assurance Corporation. Mr. Scarr died under

(1) [1893] 1 Q. B. 750.
(2) (1889) 22 Q. B. D. 504.
(3) (1889) 17 R. 6.
(4) (1903) 97 Am. St. Rep. 560.
(5) (1903) 98 Am. St. Rep. 846.
(6) (1892) 19 R. 355.
(7) (1903) 86 App. Div. Rep. S. C. N. Y. 83.

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the circumstances hereinafter stated on January 25, 1904, and Kate Scarr, his legal representative, claimed the 500*l.* as due under the policy. The corporation disputed the claim, and the dispute was referred to arbitration under the terms of the policy, except that, by consent, one arbitrator, Mr. J. A. Foote, K.C., was appointed in lieu of two arbitrators and an umpire. The policy provided for the payment of 500*l.* by the corporation in case the assured should "sustain any bodily injury caused by violent, accidental, and external and visible means within the meaning of the policy and the conditions thereto, and such injury should be the sole and immediate cause of death within three months of the occurrence of the accident." The corporation denied that this event had happened, and also relied upon the fourth condition at the foot of the policy. The arbitrator at the request of the parties made his award in the form of a special case for the opinion of the Court, and the question I have to determine is whether, having regard to the contention of the parties set forth in the case, the corporation are liable on the facts as found by the arbitrator. I will deal first with the contention of the corporation that the claimant, Kate Scarr, has not shewn that the event provided for by the policy has happened. The facts as found by the arbitrator are stated in paragraphs 3, 4, and 5 of the case. Now I will assume that on the day of the alleged accident—namely, December 26, 1903—the assured sustained bodily injury, and that it was caused by violent, external, and visible means; but the policy also requires that the means shall be accidental. What are the facts which are alleged to constitute accidental means? I will endeavour to summarize the facts found by the arbitrator. Scarr was in the apparent enjoyment of good health and able to discharge the duties of his employment, which are active duties, and he was unaware that his heart was affected. In fact, however, on December 26, and for some considerable time prior thereto, his heart was in a weak and unhealthy condition, the effect of which was to render it less capable of working under strain, or of recuperating itself as such strain ceased. At about 9.45 on the morning of December 26, being apparently in his usual state of health, he attempted to eject a drunken man, using some

physical exertion for that purpose by pushing or pulling in order to overcome the drunken man's passive resistance. The effect of this physical exertion was to make a call or demand on the heart to work harder, and the effect of the increased work of the heart under this strain was to render it incapable of recuperating and recovering its ordinary condition when the immediate demand or strain ceased, and after some hours the heart began to dilate, and the dilatation so set up was the cause of death. But for what happened on this day, December 26, Scarr might have lived a considerable time. Now were the means which caused the bodily injury under the above circumstances accidental? This is a question of some difficulty, but my difficulty has certainly been lessened by the very clear arguments that were addressed to me by the counsel on each side. It seems to me that there was nothing accidental in the pushing and pulling of the drunken man or the exercise of physical exertion in so doing. Scarr intended to do this. The drunken man offered only passive resistance. There was no blow. Then was the effect on the heart accidental? The demand or strain on the heart was the natural and direct consequence of the physical exertion, which I have necessarily assumed to be violent physical exertion. Then was the effect of this demand or strain on the heart accidental? It is true that Scarr did not foresee the effect, but this, in my opinion, cannot make it accidental if it was the natural and direct consequence of a demand or strain on a heart in the condition described. The evidence shews that there was no intervening fortuitous cause. The injury to the heart, which I assume to be bodily injury, seems to me to have been caused by the violent exertion, and the violent exertion was intended and not accidental. There was no slip or fall or blow. He intended to push and pull, and he pushed and pulled. Apart from authority, I cannot find the means to be accidental. I proceed, therefore, to examine the authorities. The only English case that has any real bearing is *Hamlyn* v. *Crown Accidental Insurance Co.* (1) In that case the words of the policy were practically the same as here. The plaintiff was stooping forward to pick up a marble dropped

(1) [1893] 1 Q. B. 750.

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by a child as it rolled from him. He stood with his legs together, separated his knees, leaned forward, and made a grab at the marble, and in doing so wrenched his knee. The contention of the plaintiff's counsel was that, as the plaintiff did not mean to get into a position in which he might wrench his knee, there was something accidental. The Court held the contention sound. The plaintiff did not mean to wrench his knee, and that would not be the ordinary result of such an action. A. L. Smith L.J. says it was accidental, for getting into the particular position in which the injury would happen was not done on purpose. I think I should have come to the same conclusion. It was as if a man walking stumbled and sprained his ankle. He did not intend to stumble. The stumbling was accidental and not the necessary or likely result of walking. That would properly be called an accident. There was no weakness of the knee or other predisposing cause. Here, as I have said, Scarr intended to violently exert himself, and the injury to the heart followed as the natural consequence. He never got into any position which he did not intend. It seems to me very like the case of a man with a weak heart injuring it by running to catch a train. He intends to run. Nobody would call such an event an accident. No one would describe him as meeting with an accident. Nor would any one in the present case speak of Scarr as having met with an accident. The question cannot, in my opinion, depend on whether or not Scarr knew he had a defective heart. If he knew that, he probably would not have tried to eject the drunken man, but that does not make the ejecting or the result accidental. I was also referred to some American cases, which are always helpful. There was *Fetter* v. *Fidelity and Casualty Co.* (1) There the assured was endeavouring to close a window sash and used a pole. The end of the pole slipped, and the sudden release of its hold had the effect of throwing him against the edge of the table, which caused a rupture of the kidney. The cause was the slipping of the pole, which threw him on the table. The slipping of the pole and his falling on the edge of the

(1) 97 Am. St. Rep. 560.

table were plainly accidental. It turned out that he had cancer, but the cancer would not have killed him for some time. It was as if the injury to the heart had been produced by some accident, such as his being thrown out of a cart. That case is, in my opinion, clearly distinguishable. *Appel* v. *Ætna Life Assurance Corporation* (1) was a case where the assured died through an injury to the appendix brought on by a bicycle ride, one of the muscles used in riding having necessarily rubbed against the appendix, which was in an unnatural condition, and inflamed it. It was held that it was not an accident. Riding the bicycle was intentional, and there was no fall or collision. He rode where he chose and brought into play such muscles of the body as he willed. I think the case is very like the present, and it supports the view I have taken. *Horsfall* v. *Pacific Mutual Insurance Co.* (2) was a case where a man, accustomed to lift heavy weights, was lifting or assisting in lifting a weight of 350 lbs. He had to stand on the top of a pile and reach below his feet in order to pick it up, and, by reason of his position, was at a disadvantage. He injured his heart, which was in a perfectly healthy condition, and died in consequence. Held, death accidental. This, I think, may be justified by the fact that injury to the heart was not in his case the natural consequence of lifting the weight, but of the unintentional exertion which his position made necessary. It is at all events distinguishable on this ground. In my opinion there never was any accident here at all, and consequently the plaintiff fails in bringing the case within the terms of the policy. It is unnecessary for me to express any opinion upon the fourth condition, or on the other points raised by the company, further than by saying that I think the defendants might have a strong case on condition 4. There must be judgment for the company.

Judgment for the insurance company.

Solicitors for claimant: *Walker & Co., for Gee & Sons, Bishop's Stortford.*

Solicitors for insurance company: *Smiles & Co.*

(1) 86 App. Div. Rep. S. C. N. Y. 83. (2) 98 Am. St. Rep. 846.

W. A.

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Dec. 20.

YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS, LIMITED, APPELLANTS; ELLIS, RESPONDENT.

Railway—Light Railway—Carriage—Local Authority—Licence to ply for Hire—"Omnibus"—"Hackney Carriage"—Town Police Clauses Acts, 1847 (10 & 11 *Vict. c.* 89), *s.* 37, *and* 1889 (52 & 53 *Vict. c.* 14), *ss.* 3, 4—*Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48).

The carriages used on a light railway, constructed and worked under the powers given by the Light Railways Act, 1896, and orders made thereunder, are not "omnibuses" or "hackney carriages" within the meaning of the Town Police Clauses Acts, 1847 and 1889, and do not, therefore, require to be licensed to ply for hire in the streets of a town under s. 37 of the Act of 1847.

CASE stated under the Summary Jurisdiction Acts by four justices of the peace for the borough of Dewsbury.

The respondent, who was the town clerk of the borough of Dewsbury, preferred an information before the justices charging that the appellants, "being the proprietors of a certain carriage —to wit, a tramway car, No. 11—did permit the same to be used as a hackney carriage plying for hire within the borough of Dewsbury without having obtained a licence from the mayor, aldermen, and burgesses of the borough of Dewsbury for such carriage so to ply for hire, as required by s. 37 of the Town Police Clauses Act, 1847."

Upon the hearing of the information the following facts were proved or admitted:—

The appellants were the proprietors of the carriage referred to in the information. The carriage was similar to a tramcar worked by electrical energy, and was constructed for and used by the appellants to run over their light railway constructed under and by virtue of the provisions of the Spen Valley Light Railway Order, 1901, and the Spen Valley Light Railway (Extension) Order, 1901, both orders being made under the Light Railways Act, 1896 (59 & 60 Vict. c. 48). The carriage formed part of the rolling stock of the appellants' railway, and

was authorized to be provided therefor by the Act and Orders. The light railway was similar in all respects to a tramway, and ran through the public streets of Dewsbury and the adjoining districts. On a day mentioned in the information the carriage was used by the appellants to carry passengers at separate fares within the borough of Dewsbury. The carriage had not been licensed by the mayor, aldermen, and burgesses of the borough, and no application for a licence had been made by the appellants.

A majority of the justices present at the hearing were of opinion that the carriage in question was an "omnibus" within the meaning of the Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), and, therefore, a "hackney carriage" within the meaning of ss. 37 and 45 of the Town Police Clauses Act, 1847 (1); that the provisions of those Acts applied to the carriage and were not overridden by the Spen Valley Light Railway Order, 1901, and that the appellants had been guilty of an offence under s. 45 of the Town Police Clauses Act, 1847, in permitting the carriage to be used as a hackney carriage plying for hire within the borough without having obtained a licence for the same.

They therefore convicted the appellants, and fined them 2*s.* 6*d.*

The question for the opinion of the Court was whether, upon the facts stated, the justices came to the correct conclusion in point of law; and, if not, what should be done in the premises.

(1) The Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 37: "The Commissioners may from time to time license to ply for hire within the prescribed distance .... such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit."

Sect. 45: If the proprietor of any carriage permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage, he shall be liable to a penalty not exceeding forty shillings.

The Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 3: "The term 'omnibus,' where used in this Act, shall include—

"Every omnibus, char-à-banc, waggonette, brake, stage coach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance ...."

By s. 4, the term "hackney carriage," when used in s. 37 of the Town Police Clauses Act, 1847, shall be deemed to include every omnibus.

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Danckwerts, K.C. (*Llewellyn Davies* with him), for the appellants. The justices came to a wrong conclusion. The carriages used by the appellants on their light railway are not "omnibuses" or "hackney carriages" within the meaning of the Town Police Clauses Acts, 1847 and 1889. The statute and orders under which the appellants obtained powers to construct and manage the light railway are quite inconsistent with the proposition that the provisions of the Town Police Clauses Acts apply with respect to licensing these carriages and their drivers. Sect. 11 of the Light Railways Act, 1896, provides that an order under that Act may contain provisions incorporating all or any of the provisions of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92) and of the Lands Clauses Acts. Sect. 12 enacts that, subject to the foregoing provisions and to any special provisions in the order, "the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway, and for the purposes of those enactments, and of the Clauses Acts so far as they are incorporated or applied by the order authorizing the railway, the light railway company shall be deemed a railway company, and the order under this Act a special Act, and any provision thereof a special enactment."

The Spen Valley Light Railway Order, 1901, ss. 45 to 61, contains a series of provisions in respect of working a light railway. The company may use flange wheels or other wheels suitable only to run on the rail of the railways. The railways may be used for the purpose of conveying goods, minerals, parcels, and animals as well as passengers. The company shall, if required by the local authority, provide a waiting-room for passengers. Power is reserved to the local authority or police to regulate the traffic on roads along or across which any railways are laid down. The carriages used on the railways may be moved by animal power or, with the approval of the Board of Trade, by mechanical power, and no animal power or steam locomotives shall be used except with the consent of the local authority and of the road authority, but that consent shall not be unreasonably withheld. The Board of Trade may

make regulations for regulating the rate of speed, the number of carriages which may be run coupled together, the use of bells, whistles, or other warning apparatus, lights on the trains or carriages, and in respect of other like matters. The local authority of the district may make by-laws (which must be allowed by the Board of Trade) in respect of the rate of speed to be observed in travelling upon any portion of the line within their district, the distances at which carriages shall be allowed to follow one after the other, the stopping of carriages using the railway, the traffic on the roads, advertisement boards on the carriages, preventing overcrowding of the carriages, and regulating the hours for the conduct of traffic other than passenger traffic. In view of these provisions it is impossible to suppose that the carriages of light railways must be licensed by the local authority under the Town Police Clauses Acts. The extent to which they are subject to the control of the local authority is strictly defined by the order, which contains no indication that any licence by the local authority is requisite. The carriages are railway carriages and subject to railway legislation; they are not omnibuses or hackney carriages. By s. 68 of the Order of 1901 the company, like other railway companies, are required to run workmen's trains. The Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 48, with respect to the licensing of tramway carriages, does not affect light railway carriages.

[He was stopped by the Court.]

Macmorran, K.C. (*C. Fleetwood Pritchard* with him), for the respondent. The justices came to a right conclusion. Sect. 38 of the Town Police Clauses Act, 1847, defines a "hackney carriage" as "every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance," &c. By s. 48 of the Tramways Act, 1870, tramcars are brought within the definition of "hackney carriage" for the purpose of requiring them to be licensed by the local authority. Then the Town Police Clauses Act, 1889, s. 4, extends the provisions, with respect to hackney carriages, of the Act of 1847 to omnibuses; and by s. 3 the term "omnibus" shall include "every omnibus,

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char-à-banc, waggonette, stage coach, and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance, but shall not include any tramcar or tram carriage duly licensed under the provisions of the Tramways Act, 1870. By specially excluding from the provisions of the Act of 1889 tramcars duly licensed under the Act of 1847 and the Tramways Act, 1870, the Legislature shewed an intention that all other cars or carriages of a similar character standing or plying for hire, and used to carry passengers at separate fares within the prescribed distance, should be included in the term "omnibus," and therefore included in the term "hackney carriages." The electric cars on this light railway are of a similar character to tramcars, and require a licence under s. 37 of the Town Police Clauses Act, 1847. The licence is required for the purpose of securing for the public benefit effective control and supervision by the police in respect of good order and conduct.

There is nothing in the Light Railways Act, 1896, or in the Spen Valley Orders, to take light railway carriages out of the operation of the Town Police Clauses Acts, 1847 and 1889.

Danckwerts, K.C., was not heard in reply.

LORD ALVERSTONE C.J. I think this point does credit to the ingenuity of those who have raised it, because it seems to me almost impossible that any one with experience of the legislation respecting railways could come to the conclusion that a carriage which is for all effective purposes a railway carriage is made subject to the provisions of the Town Police Clauses Acts with respect to the licensing of hackney carriages. By s. 37 of the Town Police Clauses Act, 1847, the Commissioners may from time to time license to ply for hire such number of hackney carriages as they think fit. The control thereby given to them is with respect, not only to the vehicles themselves, but to the drivers of them, and with respect to the good order and conduct of them. Then the Town Police Clauses Act, 1889, enabled the Commissioners from time to time to make by-laws as to the badges which were to be worn by drivers and conductors of omnibuses,

the numbers to be put upon the omnibuses, the number of persons to be carried, and for securing the fitness of the horses, and the carrying and lighting of proper lamps, and so forth. Further, in order to prevent the argument that tramcars had been brought by implication within the provisions of that Act, tramcars were expressly excluded, they having been already dealt with for certain purposes with regard to the local authority by s. 48 of the Tramways Act, 1870. It has been ingeniously suggested in this case that because tramcars were excluded from the Act of 1889, there having been special legislation with respect to them in the Tramways Act passed more than thirty years ago, the Legislature intended that all other carriages of a similar character which are not expressly excluded come within the definition of "omnibus" and "hackney carriage." I cannot think that view is correct. For years there was legislation with regard to hackney carriages culminating in the Act of 1889. In the course of time a subject-matter rather near hackney carriages, and at any rate rather near omnibuses, was called into existence—namely, tramcars—and it was thought desirable that they should be brought under the jurisdiction of the local authority for the purpose of being licensed. Accordingly there was an express enactment in the Tramways Act, 1870, that the local authority should have power to license tramcars. A few years afterwards there was legislation with regard to light railways; and, so far as I know, everything was done to make them railways in the sense of being subject to many of the same provisions as railways had been made subject to by statutes extending over a great many years, and there was no suggestion that light railways were to be licensed by the local authority. There is no trace in the Light Railway Act, 1896, or in the Spen Valley Light Railway Orders made under it, of any intention to make the light railway carriages subject to the local authority in this respect. On the contrary, there are a number of provisions in the Act indicating that what was to be constructed under it was to be subjected to what I may call railway legislation. By the Order of 1901, made by the Light Railway Commissioners and confirmed by the Board of Trade, the Board of Trade are to make regulations as to

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some matters kindred to those with which the local authority have power to deal in respect of hackney carriages under the Town Police Clauses Acts, and there are also express powers reserved to the local authority to make by-laws with regard to speed, the distances at which the carriages should follow each other, the stopping of carriages on the route, the traffic on the road, unsightly advertisements on the carriages, overcrowding, and the hours for conducting the traffic. Those matters and the matters enumerated in s. 6 of the Town Police Clauses Act, 1889, are to a large extent pari materiâ, and I think it is impossible to suppose that the Legislature, if they really intended to give the local authority the powers of s. 6 in respect of light railway carriages, would have cut down those powers to the particular matters enumerated in the order. The magistrates here have been persuaded to the conclusion that every carriage on a light railway must be licensed, and I suppose, if the argument for the respondent is to prevail, the driver and conductor must be licensed too. In my opinion a light railway carriage is a railway carriage; it is not a hackney carriage, and it is not an omnibus or a tramcar. This appeal must succeed.

KENNEDY and RIDLEY JJ. agreed.

Judgment for the appellants.

Solicitors for appellants: *Sydney Morse, for C. E. O. Walker, Dewsbury.*

Solicitors for respondent: *Sharpe, Parker, Pritchards, Barham & Lawford, for H. Ellis, Town Clerk of Dewsbury.*

W. A.

In re BOSWORTH AND CORPORATION OF GRAVESEND.

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Dec. 21.

Burial Ground—Land set apart for, in Breach of Order in Council—Disused Burial Ground—Power to build on—Metropolitan Open Spaces Act, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 4, *and Schedule.*

The prohibition imposed by s. 3 of the Disused Burial Grounds Act, 1884, against the erection of buildings upon a disused burial ground, applies to any land which has been "set apart for the purposes of interment" within s. 1 of the Metropolitan Open Spaces Act, 1881, even if it was so set apart in breach of an Order in Council prohibiting the opening of any new burial ground in the district, and consequently could never have been lawfully used for the purposes of interment.

CASE stated by an arbitrator.

By an agreement in writing, dated October 2, 1901, Emily Lucy Bosworth and Helen Pauline Bosworth, hereinafter called the vendors, agreed to sell to the corporation of Gravesend a cemetery called the Gravesend and Milton Cemetery, in the parish of Gravesend, at a price to be fixed by arbitration, and to be based upon the fair value of the property as between willing seller and willing buyer.

Part of the Gravesend and Milton Cemetery was the original cemetery belonging to the Gravesend and Milton Cemetery Company, which was incorporated by special Act of Parliament in 1838.

On August 11, 1854, an Order in Council was made under the provisions of the Burials Act, 1853 (16 & 17 Vict. c. 134), whereby it was ordered that no new burial ground should be opened in (amongst other places) Gravesend without the previous approval of one of Her Majesty's Principal Secretaries of State.

In 1859 one J. R. Hull, one of the predecessors in title of the vendors, who was then the owner of the cemetery, acquired an additional piece of land adjoining thereto, hereinafter called "the additional piece."

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On November 22, 1884, the following letter was sent to Her Majesty's Principal Secretary of State for Home Affairs :—

"Sir,

"Gravesend Cemetery.

"The Bishop of Rochester has been requested to consecrate an addition to the proprietary cemetery at Gravesend, in the county of Kent, and, referring to the Order of Her Majesty in Council of August 11, 1854, I take the liberty of asking whether, considering the form of the order, your approval is necessary to such addition being used for burials.

"(Signed) G. H. Knight,
"Registrar of the Diocese of Rochester."

In reply thereto the following letter was received :—

"Whitehall,
"December 11, 1884.

"Sir,—I am directed by the Secretary of State to acquaint you, with reference to the letter from this department of the 26th ult., stating that the approval of the Secretary of State would be necessary for the opening of any new burial ground in the parish of Gravesend, that the Extra-Metropolitan Burials Act (16 & 17 Vict. c. 134) does not, by reason of the saving in s. 5 of that Act, apply to the Gravesend Cemetery, which was established under the Gravesend Cemetery Act, 1838, and that the sanction of the Secretary of State to the proposed addition to that cemetery is not required; and I am to state that this letter may be substituted for the letter previously addressed to you, which perhaps you will be so good as to return to this office.

"(Signed) Godfrey Lushington."

The said "additional piece" of land was not used as a cemetery before December 11, 1884, but subsequently thereto the whole of it was set apart and consecrated as a burial ground inclosed by a wall, and part of it has been used as a burial ground.

There was no consent to the user of the said "additional piece" by any of the Principal Secretaries of State unless

the aforesaid letter of December 11, 1884, constitutes such consent.

Of the said "additional piece" a portion has either actually been used for interments, or is so situated that it cannot be conveniently separated from the part so used. The remaining part could be conveniently separated from the part so used by a fence so as to be available for building.

It was contended on behalf of the purchasers:—

1. That the "additional piece" of land was inclosed within the cemetery walls in violation of the Order in Council and the provisions of the Burials Act, 1853.

2. That having regard to the matters in the last paragraph contended, and to the judgment of the Court of Appeal in *Ward* v. *Portsmouth Corporation* (1) in so far as it decides that an addition to an existing burial ground is within the provisions of s. 6 of the said Act, the "additional piece" cannot lawfully be buried in.

3. That the "additional piece" having been inclosed as aforesaid and having been used as a burial ground cannot now, by reason of the decision of the Court of Appeal in *In re Ponsford and Newport District School Board* (2), be used for building land.

4. That the "additional piece" must not be valued either as ground in which interments can legally be made or as building land, but must be valued on the basis that it cannot be put to either of such uses.

It was contended on behalf of the vendors:—

1. That by reason of s. 5 of the Burials Act, 1853, which provided that its provisions should not extend to prevent burials "in any cemetery established under the authority of any Act of Parliament," the said Act does not apply to the Gravesend and Milton Cemetery or to additions thereto.

2. That the case of *Ward* v. *Portsmouth Corporation* (1) does not affect the law as it was in 1884, and that at that date an addition to an existing burial ground was not under the Act a new burial ground.

3. That if the Burials Act, 1853, and the Order in Council

(1) [1898] 2 Ch. 191. (2) [1894] 1 Ch. 454.

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do apply, the letter dated December 11, 1884, constituted such approval as was required under the said Act and Order in Council.

4. That if the said "additional piece" cannot be legally used as a cemetery, that portion of it which has not been already used for graves can be thrown into the adjoining fields and utilized and valued as building land.

The questions for the Court are whether—

(*a*) The "additional piece" of land can be used as a burial ground.

(*b*) If not, whether that part of the "additional piece" which can conveniently be severed from the part actually used for interment can be used for building purposes.

If in the opinion of the Court the answer to the first question should be in the affirmative, the arbitrator fixed the price to be paid by the purchasers at 9711*l.*

If the answer to the first question should be in the negative, but to the second in the affirmative, he fixed the price at 9015*l.*

If the answer to both questions should be in the negative, he fixed the price at 8305*l.*

The argument upon the special case herein was heard before Wright J., who answered question (*a*) in the negative, upon the ground that the Order in Council of August 11, 1854, did apply to the "additional piece," notwithstanding the terms of s. 5 of the Burials Act, 1853, and that the letter of December 11, 1884, did not amount to an approval by the Secretary of State. Before answering question (*b*) he directed the arbitrator to define more clearly upon a plan the portion of the "additional piece" to which that question related, and the further argument of the case stood over for that purpose. The argument upon the latter question now came on before Bray J.

Freeman, K.C., and *Colefax*, for the corporation of Gravesend. Although according to the decision of Wright J. no part of the "additional piece" can be lawfully used as a burial ground, the whole of it, including the part which the vendors claim to have valued as building land, is in fact a "burial ground" as defined by s. 4 of the Open Spaces Act, 1887, for it has been

"set apart for the purposes of interment," within the meaning of s. 1 of the Metropolitan Open Spaces Act, 1881. (1) It was bought and walled in for that purpose, and it was consecrated, and interments actually took place there, though the two latter facts of consecration and user are not necessary to constitute a setting apart for interments. The words "set apart" do not mean "lawfully set apart." Then, if the land in question is a burial ground, it is incapable of being used for building land; the moment it is fenced off for that purpose it will become a "disused burial ground" within s. 4 of the Act of 1887, for it will be "no longer used for interments." The case of *In re Ponsford and Newport District School Board* (2) decided that the words "no longer used" mean nothing more than "not used," and that to bring a piece of land within the definition of a disused burial ground it is not necessary that it should ever have been used for interments at all.

Sir E. Boyle, K.C., and *Eustace Hills*, for the vendors. The respondents' case is inconsistent. They say on the one hand that the additional piece is not a burial ground, and that the

(1) By s. 1 of the Metropolitan Open Spaces Act, 1881, "The term 'burial ground' shall include any ground whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800."

By the Disused Burial Grounds Act, 1884, s. 3, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purposes of enlarging a church, chapel, meeting-house, or other places of worship."

Sect. 2: "In this Act a 'disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein."

By the Open Spaces Act, 1887, s. 2, sub-s. 1, "The Metropolitan Open Spaces Act, 1881, is hereby repealed to the extent mentioned in the schedule to this Act."

Sect. 4: "In the Disused Burial Grounds Act, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council."

Schedule: "Portion of the Metropolitan Open Spaces Act, 1881, repealed." "In the same section (s. 1) the following words occurring in the definition of a 'burial ground,' viz., 'and in which interments have taken place since the year 1800.'"

(2) [1894] 1 Ch. 454.

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vendors are consequently not entitled to have it valued on that basis; and on the other hand they say that it is a burial ground, so as to disentitle the vendors to sell the unused portion as building land. They cannot have it both ways. This is not a burial ground at all. It could never be lawfully set apart for interments, and was only a burial ground in fact to the extent to which it was so used—that is to say, to the extent of the existing graves. The residue, a part of which is now claimed to be usable as building land, was not "set apart" within s. 1 of the Act of 1881, and therefore, not having been a burial ground at all, it does not come within the prohibition of s. 3 of the Act of 1884. The difficulty arising from the fact of the land having been consecrated could be got rid of by means of a faculty. The *Ponsford Case* (1) is distinguishable, for there the ground was lawfully set apart as a burial ground, the prohibition under an Order in Council against burying upon the site having been withdrawn, so that the land had the higher value which attached to it as burial ground, and there was consequently nothing inconsistent there in the respondent's contention.

Freeman, K.C., in reply.

BRAY J. The contention of the corporation in this case is a little inconsistent, and I should be disposed to reject it if I could, but I fear I am not at liberty to do so. The question I have got to decide is whether that part of the "additional piece" which can conveniently be severed from the part actually used for interment can be used for building purposes. Now s. 3 of the Disused Burial Grounds Act, 1884, provides that, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground." And the Open Spaces Act, 1887, by s. 4 defines the meaning of the term "disused burial ground" in the last-mentioned section by reference to the Metropolitan Open Spaces Act, 1881, as amended by the Act of 1887—that is to say, "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of

(1) [1894] 1 Ch. 454.

interment," and the expression "disused burial ground" shall mean "any burial ground which is no longer used for interments." Here the case finds that the whole of the "additional piece" was set apart for and consecrated as a burial ground, and that part of it has been actually used for purposes of interment. So that there is no question but that it was a burial ground; and as building could not take place upon the part which it is contended is applicable for that purpose without building a wall and separating it from the rest of the cemetery, and as such separation would primâ facie amount to a disuse for interments of the part so separated, it is obvious that the separated part would, if there were no further facts in the case, become a disused burial ground, and the prohibition of s. 3 of the Act of 1884 would apply. But here, at the time that the land in question was set apart for the purposes of interment, there was in force an Order in Council prohibiting the opening of any new burial ground in the district. And the question is whether the fact that the land could not, having regard to that prohibition, ever be lawfully used for interments makes any difference. I think it does not. It is not the less a burial ground "which is no longer used for interments" because it never could have been lawfully used for that purpose. For the case of *In re Ponsford and Newport District School Board* (1) shews that the words "no longer used" mean nothing more than "not used," and do not necessarily import that there has ever been any user at all. I must therefore answer the question in the negative, and the result is that the compensation under the award will be the lower sum of 8305*l.*

Judgment for the respondents.

Solicitors for claimants: *Harries, Wilkinson & Raikes, for C. E. Hatten, Gravesend.*

Solicitors for respondents: *Nicholson, Patterson & Freeland.*

(1) [1894] 1 Ch. 454.

J. F. C.

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Dec. 20.

LONDON COUNTY COUNCIL *v.* PAYNE & CO. (No. 2).

Weights and Measures — Weighing Machine—"False or Unjust" Scales—Weight indicated by Machine exceeding Weight of Article sold—Sale of Tea with Paper Bags—Weights and Measures Act, 1878 (41 & 42 *Vict.* c. 49), s. 25.

The respondents, who were wholesale tea merchants, received orders from some of their customers for quantities of tea to be weighed out in packets of a particular weight, and in those cases the tea was weighed out at the respondents' warehouse in the following way: A beam weighing machine was used, and a girl in their employment placed a paper bag, supplied by the customer, under the goods scoop of the machine, where it remained whilst the tea was being weighed, the effect being that the tea put into the scoop weighed less, by the weight of the paper bag than the weight on the opposite side of the machine. This mode of weighing was adopted at the request of the customer. The machine weighed justly and truly when the bag was not under the scoop. When the weighing was finished the girl put the machine, with the bag still under the scoop, aside on a shelf, and reported that the weighing was finished to the respondents' forewoman, who shortly afterwards came round and took away the paper bag, and other precautions were taken to ensure that the bag should not be used for any other weighing. An inspector of weights and measures, on visiting the warehouse when one of those weighing operations had just been completed, found the machine on the shelf with the paper bag still under the scoop:—

Held, that the respondents had committed the offence of "using" for trade a weighing machine which was "false or unjust," contrary to the provisions of s. 25 of the Weights and Measures Act, 1878.

Case stated by a metropolitan police magistrate.

The respondents were summoned before the magistrate to answer an information laid against them on behalf of the appellants charging them with using for trade a weighing instrument, to wit a beam scale, which was false or unjust—that is to say, under the goods scoop of the beam scale was a paper bag—contrary to s. 25 of the Weights and Measures Act, 1878. (1)

(1) By the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25, "Every person who uses or has in his possession for use for trade any weight measure scale balance steel-yard or weighing machine which is false or unjust, shall be liable to a fine. . . ."

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Upon the hearing of the information the following facts were proved or admitted :—

The respondents were solely wholesale tea merchants, and occupied for the purposes of their business a warehouse in Boss Street, Tooley Street. Two adjoining rooms in this warehouse were used by the respondents for weighing out tea, and about eighty girls were employed in these two rooms under the superintendence of a forewoman and under the general supervision of the respondents' manager. The forewoman had an assistant, and the rooms had an opening between them.

On March 21, 1904, at about 10.30 A.M., an inspector of weights and measures visited the premises, and was taken round the two rooms by the manager and inspected the weights and scales there. In the course of this inspection one of the girls handed down to the inspector from a shelf above her a beam scale which had a folded paper bag under the scoop in which the tea to be weighed is placed. In that condition the scale would turn with two and a half drachms of tea less than the weight on the other side of the scale. The scale without the piece of paper was correct. The scale had been used that morning in that condition by the girl to weigh out for a customer fifty pounds of tea into quarter-pound packets—that is to say, rather over 200 parcels of tea had been weighed out with it. When the inspector came up the girl had recently finished weighing out the fifty pounds, and was sweeping her counter so as to be ready for another order. Tea was weighed out by the respondents in the manner and by the means above described for three or four of their customers, of whom one, being the customer above referred to, was a customer for considerable quantities of tea and the others for comparatively small quantities. Tea was never so weighed out by the respondents unless at the request of the customer for whom it was intended, and only in bags supplied by the customer. On some days of the week no such weighing out took place, but on other days several chests or bags were so weighed out.

The girl who handed the scale down to the inspector was not

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called, but the respondents' manager and forewoman were both called, and they described the practice followed at the respondents' warehouse. From their description it appeared that a chest or bag containing, say, fifty pounds of tea would be put down by the girl's counter, and she would be given an order and directed by the forewoman to weigh it out in packets of some denomination, say quarter-pound packets, and one of the above-mentioned bags supplied by the customer would be given to the girl to fold up and place under the scoop of the scales. Having placed this bag under the scoop, she would proceed to weigh out the tea, and when she had finished this she would place the scales upon the shelf above her without removing the bag from under the scoop, and report to the forewoman that the weighing was finished. Shortly afterwards—that is to say, usually within three or four minutes, and always within ten or fifteen minutes—the forewoman would come round ; the girl would then hand down the scales, and the forewoman would remove the bag and annex it to a paper tag having certain memoranda written upon it. No one would be allowed to, nor was it suggested that any one did in fact, make use of the scale between the time of its being put up on the shelf and the time of its being handed down to the forewoman. The forewoman would afterwards place the bag and tag upon her desk, where it would probably remain for three or four days and then be thrown away. Each bench had its own set of scales. No two weighings out with a bag were allowed to be consecutive, a full-weight order being always interposed.

The practice above described was followed in this and all cases. The substantial difference between this practice and the practice obtaining in the respondents' warehouse in November, 1902, as described in *London County Council* v. *Payne & Co.* (1), was that under the present practice the paper bag was given for each operation by the forewoman before it commenced, and was always removed by the forewoman when it was finished ; whereas formerly the girl removed it. The change was not made for commercial reasons, but with the object of complying with the requirements of the Weights

(1) [1904] 1 K. B. 194.

and Measures Act, 1878. The respondents used the beam scale with the bag under the scoop for trade as and to the extent above described.

The appellants contended that the beam scale was false or unjust within the meaning of s. 25 of the Weights and Measures Act, 1878, and they relied upon *Lane* v. *Rendall* (1) and the respective judgments of Lawrance J. and Kennedy J. in *London County Council* v. *Payne & Co.* (2)

The respondents contended that the weighing out of the chest or sack of tea in the manner above described was "a particular weighing operation" within the meaning of the judgment of Lord Alverstone C.J. in *London County Council* v. *Payne & Co.* (2), and that the beam scale was not false or unjust.

The magistrate was of opinion that, inasmuch as the bag was temporarily placed under the scoop for a particular customer, and the condition of the scale was temporary and not permanent, and special pains were taken to prevent the scale in that condition from being used for any other customer, the respondents had kept within the law as laid down by Lord Alverstone C.J. in *London County Council* v. *Payne & Co.* (2), and that the beam scale was, therefore, not false or unjust within the meaning of s. 25 of the Weights and Measures Act, 1878. He accordingly dismissed the information.

The question for the opinion of the Court was whether, upon the facts stated in the case, the beam scale was false or unjust within the meaning of s. 25 of the Weights and Measures Act, 1878.

Dickens, K.C. (*F. F. Daldy* with him), for the appellants. There is no substantial distinction between the present case and *London County Council* v. *Payne & Co.* (2) Unless the supervision by the forewoman were continuous, which would be impossible, this arrangement is open to the same objection as that in the former case. The only distinction that can be drawn is that in the present case there is a different kind of supervision. That is a distinction in fact without any difference in principle.

(1) [1899] 2 Q. B. 673. (2) [1904] 1 K. B. 194.

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Avory, K.C., and *G. Elliott*, for the respondents. This is a bonâ fide attempt by the respondents to comply with the law. It is practically impossible to carry out the weighing operation without using the bag. Without it the wholesale transactions of the respondents could not be carried on. This was a temporary use of the scale for, and at the request of, a particular customer. The scale was ordinarily kept without the paper bag under the scoop, and that is the distinction between the present arrangement and that described in *London County Council* v. *Payne & Co.* (1) *Lane* v. *Rendall* (2) is also distinguishable upon the same ground.

Dickens, K.C., in reply. Placing the bag under the scoop affects the truth and accuracy of the weighing machine itself, and produces the very mischief aimed at by the section.

LORD ALVERSTONE C.J. This argument has led me to the conclusion that, in *London County Council* v. *Payne & Co.* (1), the expressions which I used in my judgment, through a desire perhaps not to strain the language and meaning of the statute, may have led persons to believe that the statute has a less wide operation and effect than I think it has. I do not see any reason to qualify or depart from anything I said in that case, the principle of which, it seems to me, has to be applied to the particular set of facts here. It is plain that the line must be drawn somewhere and at some time. It has been held that, if the scale in itself be just and true, something may be put into the scoop on which the goods are placed in order to make the weight correspond with the weight on the opposite side, and that shews that there may be a temporary use of lawful scales to weigh a particular thing in a particular way. But, having regard to the necessity of protecting the public, to the knowledge that these packets of tea and paper may be so used that buyers into whose hands they subsequently come may be prejudiced by not getting what they think they are buying, I think the Legislature may have used the language of s. 25 advisedly in order to cover cases like this, and that the words, "every person who uses a scale which is false or unjust," mean to include the use

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for the weighing operation of a scale which is false or unjust as a scale when in use. The inspector of weights and measures only visits the premises from time to time, and it is probably the safer view of the meaning of the statute that when he comes and finds the scale empty and tests it as an empty scale it shall, in order to be outside the operation of s. 25, be a just balance weighing truly that which is put into the scoop to be weighed, but that, if it does not satisfy that test, it is an unjust scale. It is admitted that our decision in the present case must follow our decision in *London County Council* v. *Payne & Co.* (1) if the state of things was that the paper bag was placed under the scoop for the purpose of weighing tea, less paper, on a great number of occasions, and was not taken from under the scoop until the scale was used again for the same purpose—in other words, if it was kept on the shelf in a condition in which it would only weigh tea less paper. I do not think the distinction between that state of things and the facts here is a sufficient distinction to make what was done an offence in the one case and not an offence in the other. I am not able satisfactorily in my own mind to exclude from the operation of s. 25 a case in which the scales are rendered for the time being unjust because a lawful operation is desired to be carried out. If the use of the scales, kept in that condition for that purpose and with that object and never used for any other purpose, is within the statute, it seems to me almost impossible to say that the case would be outside the statute if the only distinction is that the paper bag is removed between the weighings. It is stated as a fact in the present case that the respondents always interpose between two weighings with the paper bag under the scoop a weighing of a true weight of tea without the paper bag under the scoop, with the object of securing that the paper bag shall be taken out after each operation in which it is used; but it seems to me quite possible that, unless there be some effective supervision during that operation, the next weighing might take place with the paper bag still under the scoop. For these considerations I think it is safer to give the language of the

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statute its natural meaning, and to say that if a person uses, in the operation of weighing, an unjust balance in the sense that we pointed out in *London County Council* v. *Payne & Co.* (1), the case comes within s. 25, which intends to prevent the use in weighing of a balance which is at the time, as a balance, untrue; which will not hang true when there is nothing in either scale, and will not hang true when an equal weight is put into the goods scale on one side and the weights scale on the other.

I am, therefore, of opinion, although I feel the great difficulty of the matter, that the appeal must be allowed; that the magistrate was not justified in differentiating this case from *London County Council* v. *Payne & Co.* (1), and that the case should be remitted to him with a direction to convict.

KENNEDY J. The facts in this case do not, in my view, differ essentially from those in *London County Council* v. *Payne & Co.* (1) I, therefore, do not wish to add anything to the judgment which my Lord has just delivered.

RIDLEY J. I agree with the judgments which have been delivered. I do not think this case is distinguishable from *London County Council* v. *Payne & Co.* (1) There are, indeed, some differences in the facts. Here the paper bag is placed under the scoop to weigh out fifty packages (or whatever may be the number) of tea, and when the weighing is finished the bag is left under the scoop until the forewoman, by the orders of the respondents, comes round after a short interval of time and removes it. That was not so in the former case. I do not think those differences in fact are sufficient to distinguish this case from the former case against the same firm. I recognise that it may be thought that we are giving too full a meaning to the statute; but I do not shrink from saying that the statute, by the language "uses or has in his possession for use for trade any weight, measure, scale, balance, steel-yard, or weighing machine, which is false or unjust," means that a

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person ought not to use or have in his possession for use for trade any weighing machine which can be called at the time false or unjust.

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Judgment for the appellants. Case remitted.

Solicitor for appellants: *W. A. Blaxland.*
Solicitors for respondents: *Lamb, Son & Prance.*

W. A.

AMBLER AND FAWCETT *v.* GORDON.

1905

Jan. 14.

Ancient Lights—Prescription—Light necessary for Special Purpose or Business —Ordinary User—Question of Fact.

A right to a special amount of light necessary for a particular business cannot be acquired by twenty years' enjoyment to the knowledge of the owner of the servient tenement.

In considering the question of the right to relief for interference with ancient lights, it is a question of fact whether the user of the premises is one which requires an ordinary or a special amount of light. It cannot be predicated as a matter of law whether any particular business, e.g., an architect's, is an ordinary business in the sense that it only requires an ordinary amount of light.

Colls v. *Home and Colonial Stores*, [1904] A. C. 179, discussed.

AWARD in an arbitration stated in the form of a special case.

The plaintiff Ambler was an architect, and the plaintiff Fawcett was a solicitor. The defendant was the Bishop of Leeds. By the agreement of reference, after reciting that the plaintiffs were the owners of certain premises in Cookridge Street, Leeds, and that the defendant was erecting a cathedral opposite the plaintiffs' premises, and that the plaintiffs contended that the cathedral when erected would interfere with the light to which they were entitled and which had been hitherto enjoyed in connection with their premises, and that the plaintiffs were threatening legal proceedings against the defendant, but that by way of compromise it had been agreed that all disputes and differences should be referred to arbitration, it was agreed by clause 1 (inter alia) that all disputes and differences "as to the damage sustained or to be sustained"

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by the plaintiffs "in respect of the interference with or obstruction of light" to the plaintiffs' premises or to the occupier thereof by or through the erection of the cathedral be referred to the award and determination of two arbitrators, or to their umpire; and by clause 9 it was provided that the arbitrators or their umpire might in the award direct either party to do or submit to any act or execute any written instrument.

The arbitrators appointed an umpire, who held the reference, and after waiting, at the request of the parties, for the decision to be given in *Colls* v. *Home and Colonial Stores* (1), made his award in the form of the following special case:—

The plaintiffs are the owners of certain premises situate and being Nos. 23, 25, 27, 29, 31, 33, 35, and 37 on the west side of Cookridge Street, Leeds, and the defendant is erecting a cathedral opposite these premises, and the plaintiffs contend that the cathedral has interfered with the light to which they are entitled and which has hitherto been enjoyed in connection with their premises.

The plaintiffs' premises may be described as follows: Nos. 25, 27, and 33 are shops the windows of which were formerly ordinary dwelling-house or office windows, but in or since 1889 the old fronts were taken out and large shop fronts were substituted. No. 31 is now a shop, but was formerly an archway closed in by a door through which some light was admitted, but the shop was put in in or about 1899. The front of No. 27 has not been altered.

The other numbers refer to entrances to the upper parts of the buildings, which, as to the rooms over Nos. 25 and 27, are used, and have been used for upwards of twenty years past, by the plaintiff Ambler as an architect for the purposes of his offices, including a drawing office on the first-floor, for which a special amount of light is required; and at the north end they are occupied, and have been occupied for upwards of twenty years past, by a tenant of the plaintiffs, a cloth merchant, who during such period has used a part of the first-floor for the purpose of perching or examining and matching cloth, for which also a special amount of light is required. The other

(1) [1904] A. C. 179.

parts of the premises are not used for any purpose requiring a special amount of light. All the lights are ancient, except as to the additional amount of light coming through the new shop fronts.

The width between the plaintiffs' premises and the cathedral varies from 57 ft. 9 in. to 62 ft. 3 in., and the tower at the north end of the cathedral is distant 92 feet from the plaintiffs' premises. The height of the main wall of the cathedral is 50 feet, and the height of the tower taken to a point halfway up the spire is 116 feet. With the exception of the spire opposite No. 37 and a point opposite No. 31, where calculating half-way up a gabled roof an angle of only 44 degrees from the vertical is shewn, an angle of light of more than 45 degrees from the vertical remains for the whole of the ground-floor and upper windows of the plaintiffs' premises, and a slight but not material interference of light is caused to those parts of the plaintiffs' premises for which no special amount of light is required. The cathedral is not so long as the plaintiffs' premises, and at each end of the cathedral there is an open street admitting a large amount of light to the plaintiffs' premises. The site of the cathedral was formerly occupied by old buildings and was partly vacant land.

The plaintiffs claim that they are entitled to damages in respect of all the premises, and in particular to damages in respect of the special user of parts of the first-floors as before mentioned, as the rentals at present obtained, or at which the premises so occupied by the plaintiff Ambler were estimated previous to the erecting of the cathedral, will not be obtainable again.

The plaintiffs also claim that the agreement of reference constitutes a submission to arbitration for the purpose of assessing all damages sustained by them in respect of the interference with or obstruction of light to their premises, irrespective of whether or not such damage is sufficiently material or substantial to entitle the plaintiffs to an injunction in an action.

The umpire awarded and found that, notwithstanding the defendant's buildings, there remained sufficient light to the

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plaintiffs' premises for all purposes of ordinary user, and the plaintiffs were not entitled to damages for interference with such ordinary user; but, if the umpire was entitled to take into account damages which the plaintiffs had sustained in respect of loss of light to those parts of the premises used for occupation in respect of which a special amount of light was required, then he awarded 600*l.* damages to be paid by the defendant to the plaintiffs.

At the request of both parties the umpire submitted the following question for the opinion of the Court:—

Whether on the foregoing facts the umpire was bound by the decision in *Colls* v. *Home and Colonial Stores* (1), and, therefore, could not award damages to the plaintiffs, or whether he could award damages in respect of interference with such special user of light as aforesaid.

Bankes, K.C., and *Longstaffe*, for the plaintiffs.

Waugh, K.C., and *Waddy*, for the defendant.

[The arguments sufficiently appear from the judgment. In addition to the cases there mentioned, the following were referred to: *Kine* v. *Jolly* (2); *Rushmer* v. *Polsue & Alfieri, Ld.* (3)]

Cur. adv. vult.

Jan. 20. BRAY J. read the following judgment:—This is a special case stated by an umpire in his award. The plaintiffs were the owners of eight houses in Cookridge Street, Leeds. The defendant was the Bishop of Leeds, and was erecting a cathedral on a piece of land opposite, partly vacant and partly occupied by old buildings; and the plaintiffs complained that the erection of the cathedral interfered with their ancient lights. The matters in dispute were referred to arbitration by an agreement between the parties dated December 1, 1902. Mr. Blashill was appointed umpire, and the reference proceeded before him. After the evidence was closed he was asked to defer making his award till the House of Lords had given their decision in *Colls* v. *Home and Colonial Stores* (1),

(1) [1904] A. C. 179. (2) [1905] W. N. 2.
(3) (1905) 21 Times L. R. 183.

and subsequently to state his award in the form of a special case. This he did, and by his award, after stating certain facts, awarded and found as follows: "Notwithstanding the defendant's buildings, there remains sufficient light to the plaintiffs' premises for all purposes of ordinary user, and the plaintiffs are not entitled to damages for interference with such ordinary user; but, if I am entitled to take into account damages which the plaintiffs have sustained in respect of loss of light to those parts of the said premises used for occupation in respect of which a special amount of light is required, then I award 600*l.* damages to be paid by the defendant to the plaintiffs"; and he submitted to the Court the following question: "Whether on the foregoing facts I am bound by the decision in *Colls* v. *Home and Colonial Stores* (1), and, therefore, cannot award damages to the plaintiffs, or whether I can award damages in respect of interference with such special user as aforesaid." This is the question which I have to decide.

Mr. Bankes, on behalf of the plaintiffs, took three points. First, he said that the umpire had found that an architect's business was not an ordinary business; that this was wrong in law; that an architect's business was an ordinary business, and, as he had found that the light was insufficient for this business, he had found that it was insufficient for an ordinary business, and therefore, according to the law as laid down in *Colls' Case* (1), there had been an actionable interference with the plaintiffs' ancient lights, and the plaintiffs were entitled to the 600*l.* damages; and, as an alternative to this, he contended that the question whether an architect's business was an ordinary business was a mixed question of law and fact, and the umpire must have misdirected himself or misunderstood *Colls' Case* (1), and I ought to send the case back for him to state the facts more fully. Secondly, he contended that the twenty years' enjoyment had given the plaintiffs a right to the special light. Thirdly, he contended that by the agreement of reference the defendant had agreed to pay for actual damage sustained whether there was actionable interference or not.

I will examine these contentions. First, what is meant by

(1) [1904] A. C. 179.

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the expressions which are to be found in this special case and in the judgments in *Colls' Case* (1)—"ordinary user," or "ordinary business," or "ordinary purposes"? I think that the word "ordinary" is used solely with reference to light, and an ordinary user or ordinary business means a user or business which in fact requires only an ordinary amount of light. Is this a question of law or fact? In my opinion it is a question of fact. It must depend upon the evidence in each case, and it cannot be predicated as a matter of law whether an architect's business or any other business is an ordinary business. If I am right in this, I have no power to interfere with the finding of the umpire.

I do not think it is even mixed fact and law; but if it were, I feel quite unable to see where the umpire has misdirected himself, or how he has misunderstood *Colls' Case*. (1) When I look at the facts as stated in paragraphs 4 to 7 of the case, it seems to me that the plaintiffs have a far weaker case than the Home and Colonial Stores had. The width of the street in *Colls' Case* (1) was about equal to the height of the defendants' buildings—namely, 41 feet; here the street averages 60 feet in width, and the height of the main wall is only 50 feet. It is true that opposite some small parts of the plaintiffs' premises the angle is reduced to 44 degrees or even less; but these are not the parts of the premises where the special light is required. It seems to me that the umpire would have been wrong, even as regards the ground-floor, if he had found that there was an actionable interference, much more so as regards the first-floor. If his findings are to be criticized, the observation I should be disposed to make is that an architect and a cloth merchant must require an extraordinary quantity of light if damages to the amount of 600*l.* have been sustained by the erection of the cathedral. But, however that may be, I accept the umpire's finding, and, accepting it, I am quite unable to see that the umpire has misdirected himself or misunderstood *Colls' Case*. (1) In truth, the findings that architects and cloth merchants require a special light and that this light has been interfered with are intended by the umpire to be findings in the plaintiffs'

(1) [1904] A. C. 179.

favour, which will enable them to raise their second point. Further, it seems to me that the umpire has not intended to state a special case to enable the plaintiffs to raise their first point or to dispute any of his findings of fact. The only point raised is whether, "on the foregoing facts," he is prevented from awarding damages, and I have no right to question the facts.

I come now to the second point, which does raise a question of law—namely, whether use or enjoyment of a special light for twenty years gives a right to that special light, and thus enlarges his easement and increases the burden of the servient tenement. It is important to observe that the umpire does not state as a fact that the owners of the servient tenement were aware that the premises were being used for businesses that required special light. It was said by the plaintiffs' counsel that no evidence was given at the hearing before the umpire about it, and that if it is a relevant fact I ought to send the case back to the umpire to find it. I do not agree with that contention. A plaintiff has to prove his case, and if he does not prove a necessary part of his case he must fail. The only fact, therefore, that I have to deal with is the use and enjoyment of the special light for twenty years. Does that give a right to it? Now this most important point was not decided in *Colls' Case* (1); it was much discussed, but as their Lordships came to the conclusion that there was no sufficient evidence of twenty years' user it became unnecessary to decide it. It is, however, referred to in Lord Davey's judgment, which is also the judgment of Lord Robertson, and is touched upon in Lord Lindley's; but there is certainly nothing in either of these judgments which assists the plaintiff's contention; on the contrary, the inclination of their opinion seems to be against it. There is a dictum in the judgment of Malins V.-C. in *Lanfranchi* v. *Mackenzie* (2) distinctly opposed to the plaintiff's contention if knowledge is not to be assumed; and Mr. Bankes was unable to point to any dictum in any case in his favour. The reasons of Malins V.-C. for thinking that no right could be gained in the absence of knowledge seem to me to be

(1) [1904] A. C. 179. (2) (1867) L. R. 4 Eq. 421, at p. 430.

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unanswerable. If the origin of the right to light is a supposed lost grant or covenant, as the cases seem to shew, who would presume that the owner of the servient tenement intended to grant a special right beyond the ordinary right, where he was ignorant of the special user or enjoyment? I am, however, prepared to go further, and to hold that even twenty years' enjoyment to the knowledge of the servient tenement will not give a larger right. I think the result of the judgments in *Colls' Case* (1) is to shew that the test of the right is whether the obstruction complained of is a nuisance. If one turns to the nuisance cases, do we find any trace of a doctrine that a person in bad health or carrying on a delicate trade is entitled to more comfort or freedom from annoyance than ordinary people because for twenty years his neighbours have been aware of his state of health or the trade he was carrying on and have left him undisturbed? I am not aware of any decision which suggests it. Such a proposition sounds absurd. Again, I think in many of the judgments in *Colls' Case* (1) and in other cases it is implied, if not expressed, that, in measuring the quantum of light to which the owner of the dominant tenement is entitled, the purpose for which he desires to use, or uses, the light should be disregarded, and does not either enlarge or diminish the easement which he has acquired. See especially the judgment of Lord Davey, where he says (2): "It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits. . . . If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard?" So in *Yates* v. *Jack* (3) Lord Cranworth rejects the argument of the defendant that the plaintiff's *present* business did not require a strong light, and for this business there remained a sufficient light. So, again, in *Courtauld* v. *Legh* (4) it was held that the

(1) [1904] A. C. 179.
(2) [1904] A. C. at p. 203.
(3) (1866) L. R. 1 Ch. 295.
(4) (1869) L. R. 4 Ex. 126.

right was acquired although for a part of the twenty years the house was uninhabited and unfit for habitation. It was well observed by Mr. Waugh in his argument for the defendant that the special user on which the claim is founded is a user on the dominant tenement and not on the servient tenement. The servient tenement is not in any way affected by it. If the true doctrine be that which is laid down in *Colls' Case* (1), that by twenty years' user all that is acquired is a right to prevent the defendant from building so as to interfere with the light previously enjoyed so materially as to amount to a nuisance, I think it would not be logically consistent with this doctrine to hold that a larger right can be acquired. I think also that to introduce the element of the quantum of user would work inconvenience and introduce uncertainty. If the only right capable of being acquired be sufficient light for the ordinary uses of inhabitancy and business, the owner of the servient tenement knows his exact position; he knows within reasonable limits how high he can raise his buildings, and whether during the twenty years it is worth his while to obstruct his neighbours' windows. If a right to special light be capable of acquisition without his knowledge he cannot know his position, and if he has notice of some special light being required for his neighbour's business he cannot measure the extent with any exactitude. It seems to me altogether unreasonable to presume that any man would have made a grant of such an indefinite easement. On the whole I think both reason and authority compel me to decide this point against the plaintiffs.

The last point seems to depend entirely upon the true construction of the agreement of December 1, 1902. Has the defendant by that agreement agreed to pay for actual damage sustained, whether there was an actionable interference or not? Reliance was chiefly placed on the recital and on clause 1. It was said that the recital states that the agreement was a "compromise," which implies concession on both sides, and that if the defendant had not made this concession he had made none. Mr. Waugh pointed out that clause 9 was a concession, and I think he is right. I think this power was given

(1) [1904] A. C. 179.

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in lieu of the power to grant an injunction. The real question, however, depends on clause 1. Does "interference with or obstruction of light" mean legal or actionable interference or obstruction, or, in other words, is it interference with or obstruction of light to which the plaintiffs were entitled? The recital implies that this was disputed, and this I think was the dispute referred to arbitration. I cannot draw from the words of the agreement any inference that the defendant intended to give up any legal defence. I think the dispute was whether the plaintiffs had sustained legal damage for which any action would lie against the defendant. It remains, therefore, to look again at the findings of the umpire. He has found that sufficient light remained for all purposes of ordinary user. I think that finding was substantially the same as the finding of Joyce J. in *Colls' Case* (1); and, the House of Lords having held that on that finding no action lay either for an injunction or for damages, I must hold that the plaintiffs are entitled to no damages here, and must direct judgment to be entered for the defendant with costs, so far as I have any jurisdiction to deal with costs

Judgment for defendant.

Solicitors for plaintiffs: *Pitman & Sons, for Herbert Denison, Leeds.*

Solicitors for defendant: *Johnson, Weatherall & Sturt, for J. Watkinson, York.*

(1) [1904] A. C. 179.

F. O. R.

FINCK *v.* TRANTER.

1905
Jan. 24.

Mortgage—Equitable Mortgagee—Right to receive Rents—Claim by Tenant for Repayment.

Although an equitable mortgagee has no legal right to be paid the rents of the mortgaged property, yet if he has been paid rent by a tenant of the equitable mortgagor after notice to the tenant that the rent is claimed by him as equitable mortgagee, he cannot be compelled to refund the rent to the tenant.

APPEAL of the plaintiff from the judgment of the Common Serjeant in an action tried in the Mayor's Court.

The plaintiff was the occupier of certain premises in the City of London as tenant of one Vincent, the lessee. On February 19, 1903, Vincent deposited the lease of the premises with the defendant as security for an advance of 250*l.* then made by the defendant to Vincent, and at the same time an agreement in writing was entered into by Vincent as mortgagor and the defendant as mortgagee by which Vincent charged the premises with the payment of the 250*l.* and interest.

On March 21, 1904, Vincent being then in default in the repayment of the principal and interest, the defendant's solicitors gave notice in writing to the plaintiff to pay all rent then due or thereafter to become due in respect of his tenancy of the premises to them on behalf of the defendant "as mortgagee" of the premises "under and by virtue of a charge dated February 19, 1903." The plaintiff paid to the defendant's solicitors 10*l.*, being one quarter's rent of the premises to March 25, 1904, and subsequently brought this action to recover the 10*l.* as money received by the defendant for the use of the plaintiff.

The Common Serjeant held that the equitable mortgage gave the defendant authority to receive the rent as Vincent's agent as soon as Vincent made default, and that the notice of March 21, 1904, was a notice to pay the defendant as having such authority, and he accordingly directed the verdict to be entered for the defendant.

The plaintiff appealed.

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Morle, for the plaintiff. The action is maintainable. An equitable mortgagee has no legal right to demand or receive payment of rent from a tenant of the mortgagor: Fisher on Mortgages, 5th ed. par. 1727; *Ex parte Bignold*. (1) Therefore the defendant, when he obtained payment of the rent from the plaintiff, was in the same position as any other person who has received rent without being legally entitled to it; he is bound to account for it, and the plaintiff can recover it back as on a failure of consideration: *Newsome* v. *Graham*. (2) The plaintiff remained liable to pay this rent to the mortgagor, and, if the latter had sued him for it, a plea of payment to the mortgagee would not have afforded a good defence. The equitable mortgage did not constitute the defendant the agent of the mortgagor to collect the rent.

[LORD ALVERSTONE C.J. referred to *Sumpter* v. *Cooper*. (3)]

Gutteridge, for the defendant. It is not disputed that an equitable mortgagee is not entitled to receive rents. In order to entitle him to do so, he must take out equitable execution as by obtaining the appointment of a receiver, or he can apply for an order of sale, in which case he is entitled to the rents from the date of his application. But if an equitable mortgagee does in fact receive the rents, the Court will not order him to refund them: *Ex parte Williams* (4); *Garry* v. *Sharratt*. (5) The plaintiff might have refused to comply with the defendant's demand of the rent, and might have compelled him to come to the Court for the appointment of a receiver; but instead of doing so the plaintiff, who had notice that the rent was being claimed by the defendant as equitable mortgagee (for the notice referred to the charge), paid the rent to the defendant. In these circumstances the payment cannot be regarded otherwise than as voluntary. If the rent had been subsequently claimed from the plaintiff by the mortgagor, the facts would have afforded a good equitable defence.

Morle, in reply. The payment was no more voluntary than is any other payment of rent to a person who is not entitled to

(1) (1834) 4 D. & Ch. 259.
(2) (1829) 10 B. & C. 234.
(3) (1831) 2 B. & Ad. 223; 36 R. R. 552.
(4) (1859) 12 L. T. 180.
(5) (1830) 10 B. & C. 716.

demand it. *Ex parte Williams* (1) and *Garry* v. *Sharratt* (2) were cases between the assignees of the mortgagor and the mortgagee, and as between them it would be contrary to equity to compel the mortgagee to refund the rents received by him; but those decisions have no application to a case between the mortgagor's tenant and the mortgagee.

LORD ALVERSTONE C.J. The question raised by this case is, I think, new. I should have thought that one conclusive answer to the plaintiff's claim would be that the rent was not paid to the defendant under any mistake of fact, but with full knowledge on the part of the plaintiff that the defendant was demanding it in his capacity of equitable mortgagee, the plaintiff having had notice of the charge. I mention that because the Common Serjeant appears to have based his judgment upon the point that the equitable mortgage gave the defendant authority as agent for the mortgagor to receive the rent as soon as default had been made under the mortgage. I am not prepared to overrule the Common Serjeant on that point, but I think the defendant's case can also be supported on another ground. I agree with the main contention of the plaintiff that an equitable mortgagee has no right to receive rent until he has obtained an order of the Court. The authority for that proposition is to be found in *Ex parte Bignold* (3), the case referred to in Fisher on Mortgages, where it was held that in general an equitable mortgagee is not entitled to the rents prior to the date of the order for sale; but the Court also held that where an equitable mortgagee gets possession lawfully, he is entitled to the rents from the date of possession. It follows, therefore, that even though the defendant was not entitled as of right to demand that the rent should be paid to him, yet as it was not paid by the plaintiff under any mistake of fact, but after notice that the defendant was claiming it as equitable mortgagee, the plaintiff cannot recover it back. It was contended that if an action had subsequently been brought against the plaintiff by his landlord, the mortgagor, to recover

(1) 12 L. T. 180. (2) 10 B. & C. 716.
(3) 4 D. & Ch. 259.

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this same rent, he would have had no defence to the action, but a plea that the rent had been paid to the present defendant with the knowledge of the landlord would have been a good defence; and that is, I think, what the Common Serjeant has decided. This appeal must, therefore, be dismissed.

KENNEDY J. I am of the same opinion. It appears to me that, apart from the contention as to the implied authority from the mortgagor to the mortgagee to receive the rent as his agent, an action like the present one will not lie where the person paying the rent knew that the person claiming it was doing so in his capacity of equitable mortgagee. Further, I think this case is distinguishable from *Newsome* v. *Graham* (1) by the fact that, if the equitable mortgagee had been sued by the mortgagor for the amount of rent received by him, he would have had a good equitable defence to the action.

RIDLEY J. I agree.

Appeal dismissed.

Solicitor for plaintiff: *H. L. Smiles.*
Solicitors for defendant: *Bayliss, Pearce & Co.*

(1) 10 B. & C. 234.

F. O. R.

GODLONTON *v.* FULHAM AND HAMPSTEAD PROPERTY COMPANY, LIMITED.

1905
Jan. 25.

Landlord and Tenant—Distress for Rent—Lodger's Goods—Declaration by Lodger—Inventory of Goods—"Subscribing" the Inventory—Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict. c.* 79), *s.* 1.

The superior landlord of a house having levied a distress upon the goods of a lodger for rent due from the immediate tenant, the lodger served the superior landlord with a correct declaration under the Lodgers' Goods Protection Act, 1871. The declaration stated that the goods, "a list of which is hereunto annexed," were the property of the lodger, and also that "the list of articles hereto annexed is a correct inventory" of the goods referred to in the declaration; and upon a subsequent part of the same piece of paper there was an inventory. The declaration was signed by the lodger at the foot thereof, but the inventory was not otherwise signed by him:—

Held, that the inventory was "subscribed" by the lodger within the meaning of s. 1 of the Lodgers' Goods Protection Act, 1871, which provides that "to such declaration shall be annexed a correct inventory, subscribed by the lodger."

APPEAL from the county court of Westminster.

The defendants were the superior landlords of a house in which the plaintiff was a lodger. They levied a distress for rent due from their tenant, and certain goods of the plaintiff were seized under that distress. The plaintiff thereupon made, and served upon the defendants, a declaration under the Lodgers' Goods Protection Act, 1871. (1) The declaration

(1) The Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), s. 1: "If any superior landlord shall levy or authorise to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof

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was as follows: "I hereby give you notice that Mr. ———, the tenant of this house, has no right of property or beneficial interest in the furniture goods and chattels, a list of which is hereunto appended, which are now in and upon the said premises and which you have distrained upon for rent due to you from the said Mr. ———; and I hereby declare that the said furniture goods and chattels are the property of myself as and being a lodger in the said house. I further give you notice and declare that no rent is due from me to Mr. ——— on account of the rent of the lodgings I occupy in this house. And I give you notice that the list of articles hereto annexed is a correct inventory of the furniture goods and chattels referred to in the above notice or declaration." This declaration was signed at the end of it by the plaintiff; and on a subsequent part of the same piece of paper there was written an inventory of the plaintiff's goods, which was not otherwise signed by him.

The plaintiff's goods were sold under the distress, and he brought this action in the county court claiming damages for illegal distress and trespass. The county court judge found that the plaintiff was a lodger and that the goods described in the inventory were his; but he held that, although the inventory was sufficiently identified in the declaration, the plaintiff had not "subscribed" the inventory as required by the Act, and gave judgment for the defendants.

The plaintiff appealed.

Cockle, for the plaintiff. The declaration refers to and identifies the inventory, and the signature at the end of the declaration is a sufficient signature or subscription of the inventory annexed thereto. "Subscribed," in s. 1 of the Lodgers' Goods Protection Act, means signed, and this inventory was signed or subscribed within the meaning of this Act.

Roskill, K.C. (*H. Simmons* with him), for the defendants.

as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration."

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By the provisions of this Act a landlord is deprived of his common law right, and the conditions upon which he can be so deprived are fully set out. All those conditions must be strictly and rigidly complied with before the lodger can claim the protection given to him by the Act: *Thwaites* v. *Wilding* (1); *Morton* v. *Palmer*. (2) Sect. 1 of the Act provides that the lodger must make a declaration, and also that to the declaration there must be annexed a correct inventory "subscribed by the lodger." That means that the inventory itself must be subscribed or signed, and the signing of the declaration cannot be a strict compliance with the provision requiring that the inventory shall be subscribed.

LORD ALVERSTONE C.J. The learned county court judge decided this case against the plaintiff upon the ground that he had not rigidly complied with the terms of the Lodgers' Goods Protection Act, 1871, on the authority of *Thwaites* v. *Wilding*. (1) In that case it was held that the conditions prescribed by the statute must be strictly complied with, and with that I agree. In the present case a proper declaration was made and signed by the plaintiff, which states "that the list of articles hereto annexed is a correct inventory," and the inventory was written on the same piece of paper, but was not otherwise signed or subscribed. In my opinion the inventory was sufficiently "subscribed" within the meaning of the Act. This appeal must therefore be allowed.

KENNEDY and RIDLEY JJ. concurred.

Appeal allowed.

Solicitors for plaintiff: *Dyson Smith & Marchant.*
Solicitors for defendants: *Steadman, Van Praagh & Gaylor.*

(1) (1883) 12 Q. B. D. 4. (2) (1881) 45 L. T. 429.

W. A.

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Jan. 27.

SPENCER, WHATLEY & UNDERHILL *v.* FORSTER & CO.

County Court — Jurisdiction — Remitted Action — Amendment — Claim for Unliquidated Damages—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 87.

An action, commenced in the High Court by a writ specially indorsed with a claim for 33*l.* 12*s.* for demurrage at a specified rate in respect of the detention of the plaintiffs' wagons, was remitted to the county court under s. 65 of the County Courts Act, 1888. At the trial the plaintiffs failed to prove an agreement to pay demurrage:—

Held, that the county court judge had power to amend the particulars of claim by substituting a claim for unliquidated damages.

APPEAL of the plaintiffs from the Marylebone County Court.

The action had been commenced in the High Court by a writ specially indorsed with a claim for 33*l.* 12*s.* for demurrage in respect of the detention of the plaintiffs' wagons at the agreed rate of 3*s.* a day for each wagon. The plaintiffs took out a summons for judgment under Order XIV., on which an order was made under s. 65 of the County Courts Act, 1888, remitting the action to the county court for trial.

At the trial the plaintiffs failed to prove any agreement by the defendants to pay demurrage, and an application was thereupon made to the deputy county court judge to amend the particulars by substituting a claim for unliquidated damages for the detention of the plaintiffs' wagons.

The deputy county court judge held that, under s. 65 of the County Courts Act, 1888, only a claim for liquidated damages could be remitted, and that, as the plaintiffs could not support their claim for demurrage, he had no power to convert the claim into one for unliquidated damages for detention, and he accordingly nonsuited the plaintiffs.

The plaintiffs appealed.

R. W. Turner, for the plaintiffs. The judge had jurisdiction to amend the particulars so as to enable the plaintiffs to claim unliquidated damages. By s. 65 of the County Courts Act, 1888, where an action is remitted to the county court, "the

action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." The effect of those words is to put the action for all purposes in the same position as it would have been if it had been begun in the county court, and, therefore, s. 87 of the Act, which empowers the judge to make "all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties," applies to a remitted action, and under that section the judge had power to make the amendment asked for.

[He was stopped.]

Schwabe, for the defendants. The refusal to allow an amendment was right. The plaintiffs were asking the judge to substitute a claim for unliquidated damages for a claim for a liquidated demand, which was the action which had been remitted. There is no power to remit an action in which unliquidated damages are claimed: *Bassett* v. *Tong* (1); and a county court judge cannot amend the claim in a remitted action so as to convert the action into a claim for unliquidated damages, for it is not within the jurisdiction of a county court to try an action commenced in the High Court for unliquidated damages, and a judge cannot amend so as to give himself jurisdiction: *In re Hopper and Warburton*. (2) The language of s. 65 supports the defendants' contention, for it is "the action" which has been remitted, not a totally different action, which is to be tried as if it had been begun in the county court, and to which the powers of amendment conferred by s. 87 are to apply. The plaintiffs are in effect asking to be allowed to discontinue one action and to commence a fresh one, which could not have been remitted to the county court. If the amendment can be permitted, it will always be open to a plaintiff to proceed by way of a specially indorsed writ and Order XIV., thereby getting the advantage of being able to compel the defendant to state his defence on oath, and then, if the action is remitted, the plaintiff can change his claim into one for unliquidated damages, although, if the plaintiff cannot prove that a liquidated sum is due, he is not entitled to apply

(1) [1894] 2 Q. B. 332. (2) (1863) 32 L. J. (Q. B.) 104.

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for judgment under Order XIV., and ought to bear the costs of doing so; but when once the case has been remitted, the county court has no power to deal with those costs.

Turner, in reply. *Bassett* v. *Tong* (1) was not a case which had been remitted, and is not in point. When once a case has been remitted, rightly or wrongly, it becomes a county court case for all purposes, with all the powers of amendment conferred by s. 87: *Dierken* v. *Philpot.* (2)

LORD ALVERSTONE C.J. This case raises a question of considerable importance, and one worthy of consideration by the Court of Appeal if it should be thought advisable to take the case to that Court. At first sight there seems to be a great deal of force in the argument for the defendants. It is said that it has been decided in *Bassett* v. *Tong* (1) that the language of s. 65 of the County Courts Act, 1888, is so specific that an action for unliquidated damages cannot be remitted to the county court, and therefore that, as this action could not have been remitted if the claim in the first instance had been for unliquidated damages, the county court judge was right in holding that he had no jurisdiction to make the desired amendment.

It is not disputed that if the action had remained in the High Court the amendment could have been made, and if it had been commenced in the county court, as it might have been, the claim being under 50*l.*, the amendment could also have been made, because a county court judge has the same powers of amendment in cases within his jurisdiction as a judge of the High Court. The question therefore comes to this: Are we bound as a result of the decision in *Bassett* v. *Tong* (1) to hold that the county court judge in the case of a remitted action has only jurisdiction to try the action in the actual form in which it has been commenced, without having the power of amending the proceedings so as finally to decide the real question between the parties? It is provided by s. 65 that when an action is remitted to the county court "the action and all proceedings therein shall be tried

(1) [1894] 2 Q. B. 332. (2) [1901] 2 K. B. 380.

and taken in such court as if the action had been originally commenced therein"; and it seems to me that those words must have been intended to give to the county court judge the same powers of amendment in a remitted action as he would have had if the action had been commenced in the county court. I think, therefore, that it is not correct to say that the powers of amendment in a remitted action are restricted in the manner contended for by the defendants. This view is supported by the language of s. 87, which says that "all such amendments as may be necessary for determining the real question in controversy between the parties shall be so made, if duly applied for."

It is said that the result of allowing an amendment in a remitted action by which the claim is converted into one for unliquidated damages might be to inflict a hardship on the defendant in the matter of the High Court costs, which the county court judge has no power to deal with; but I am inclined to think, though I express no final opinion on the point, that as a condition of allowing the amendment the county court judge might impose terms on the plaintiff with regard to the payment of the High Court costs.

I should be unwilling to hold, unless the language of the Act clearly compelled me to do so, that where an action is remitted the county court judge can only try it in the form in which it comes to him from the High Court, and in view of the words in s. 65 to which I have referred I am loth to restrict the very salutary powers of amendment given to judges by s. 87 of the Act. For these reasons I am of opinion that this appeal must be allowed.

KENNEDY J. I am of the same opinion, and I agree with the judgment of my Lord. The point is a difficult one, and has been put with much force and clearness by counsel for the defendants; but I confess I should be very sorry to have to come to any other conclusion. Speaking for myself, I should like to add a few observations from one point of view. The argument for the defendants largely depends on certain ill results which it is said might result if, after an application for

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judgment under Order XIV., an action is remitted and then an amendment is applied for in the county court by allowing a claim for unliquidated damages to be substituted for the claim as originally indorsed on the writ. But this is really only a small part of the general question, and to confine the argument to cases under Order XIV. prevents the whole question from being considered. If the argument is good, then it follows that in a case where there have been no proceedings under Order XIV., and where the order to remit has been made on the application of the defendant himself, if it should appear at the trial that the claim ought to have been for unliquidated damages, the defendant might successfully resist an application to amend on the ground that there is no power to remit an action for unliquidated damages. We are asked to hold that in the case of a remitted action, which at the time of remittal must be treated as a liquidated claim, the plaintiff can never amend so as to claim unliquidated damages, although s. 65 expressly states that the action is to be tried as if it had been originally commenced in the county court, and under s. 87 the county court judge has the most ample powers of amendment for the purpose of determining the real question in controversy between the parties. I think it would be a flaw in the administration of justice if we were compelled to give effect to the defendants' contention. Of course terms may be imposed as a condition of leave to amend, and I agree with what my Lord has said on this point, though I should be unwilling to impose any terms unless there were grounds for supposing that the defendant had really been misled, for it does not seem to me likely that any substantial case of injustice would arise.

RIDLEY J. I agree. I think the point is a difficult and arguable one; but, as the ground has been covered by the judgment of my Lord and Kennedy J., I do not desire to add anything to what they have said.

Appeal allowed.

Solicitor for plaintiffs: *Percy W. Taylor.*
Solicitor for defendants: *G. M. Folkard.*

F. O. R.

WOLFE *v.* CLERK OF THE COUNTY COUNCIL OF SURREY.
REEVE *v.* THE SAME.

1904
Nov. 18, 21;
Dec. 19.

Parliament — Franchise — County Vote — Qualification — Freehold Benefice — Receipt of Pew-rents by Vicar — Occupation of Church within Limits of Parliamentary Borough — Representation of the People Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 24.

The vicar of a parish, constituted under the Church Building Acts and situate within the limits of a parliamentary borough, who receives the pew-rents as part of his stipend, is not the occupier of the church within the meaning of s. 24 of the Representation of the People Act, 1832, and is not deprived by virtue of that section of his right to a vote for the county in respect of his freehold benefice.

Legal possession of the freehold of a church by the vicar, coupled with the receipt of pew-rents, is not sufficient to create an occupation within s. 24; to create such an occupation there must be actual, as well as legal, possession.

CASES stated by the revising barrister for the Wimbledon Division of the county of Surrey, which involved similar points and were argued together.

WOLFE *v.* CLERK OF THE COUNTY COUNCIL OF SURREY.

In this case the Rev. E. J. Wolfe claimed a county parliamentary vote for the Wimbledon Division of Surrey in respect of his freehold benefice, St. Thomas's, Telford Park, Streatham. The claim was duly objected to, and disallowed.

The vicarage of St. Thomas's was a new district parish or chapelry cut out of the new parish of Christ Church in the ancient parish of Streatham, in the Streatham ward of the metropolitan borough of Wandsworth and the Clapham Division of the parliamentary borough of Battersea and Clapham. The claimant lived in his dwelling-house, which was in the parish of St. Thomas in the said parliamentary borough.

The deed of consecration, dated December 21, 1902, recited

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that, whereas the minister, churchwardens, and certain inhabitants of the parish of Christ Church had represented to the bishop that by deed, dated March 30, 1899, made between Lees Knowles of the one part and the Ecclesiastical Commissioners of the other part, a piece of land was conveyed to the Ecclesiastical Commissioners and their successors to be held for the purposes of certain of the Acts of Parliament for building churches, and to be appropriated as the site of the then intended new church of St. Thomas, with the surrounding yard and inclosure thereto belonging; that a commodious building was erected thereon and completed and fit for divine service; that it was intended that the church should be enlarged as soon as practicable, and that when so enlarged it would contain 850 sittings, of which 300 sittings were to remain for ever free and unappropriated; that by deed dated November 1, 1899, the right of patronage and nomination of the intended new church of St. Thomas was to be vested for ever in certain trustees parties to the last-mentioned deed; that the ministers and churchwardens of Christ Church had besought the bishop to consecrate the building as and for a church; the deed then declared the building to be duly consecrated. The deed contained no reference to sittings or pews save as above stated.

The claimant was duly inducted into the vicarage by deed dated December 29, 1903, which recited that the vicarage of St. Thomas, Telford Park, was constituted by an order of His Majesty in Council dated July 9, 1903. The Order in Council stated that the Ecclesiastical Commissioners, acting in pursuance of 59 Geo. 3, c. 134; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60, and 19 & 20 Vict. c. 55, assigned a district chapelry to the consecrated church of St. Thomas in the new parish (sometime chapelry district) of Christ Church. The boundaries of the district chapelry of St. Thomas were defined by the order. The order assigned to the minister of the chapelry all the fees for marriages, baptisms, churchings, and burials, the effect of which was to constitute St. Thomas a parish by statute. The Order in Council contained no reference to churchwardens or to sittings or pews.

The freehold of the piece of ground constituting the site of the church and the surrounding yard and the inclosure thereto belonging vested in the claimant on induction as vicar of the new parish.

The church, which had not been enlarged since the date of consecration, was fitted with sittings or pews consisting of rows of benches open at the ends and fixed on the floor; each bench was numbered and had room for several sitters. The sittings were let, one or more, to any person applying for them for half a year and not longer, no pew or seat being sold outright; they were let in writing, specifying the number of the pew or sitting and the price; they were let for use during the ordinary public services only, and not for additional or special or semi-private services; and if the seatholders were not in their places at the commencement of divine service the claimant, or those acting for him, could put strangers into the seats that were let but not occupied. The letting was actually done by the churchwardens; the claimant's churchwarden collected the seat money, and handed it over to the claimant, less cost of collection, for the claimant's own use and benefit.

The amounts collected from the letting of seats did not appear in any of the parish accounts. All the sittings were letable, but in fact many were not taken. There were at present no declared free places in the church. The scale of rents for sittings was fixed by the claimant in consultation with the churchwardens, and the receipts for pew-rents had been at the rate of 40*l.* a year.

Before the claimant was instituted or inducted into the living a number of questions were put to him in print or writing, and he answered them, returning the paper to the registry of the diocese. Some of the questions related to the sources from which the claimant's income might come, and he made it plain by his answers that he should look to the letting of seats for part of his income.

There was no residence attached to the living or benefice; there was no glebe or tithe, and there was no income from land, unless or save as above appears.

No documents were produced before the revising barrister,

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save copies of the consecration and induction deeds, and a copy of the forms of declarations and oaths usually made or taken before institution.

No evidence or proof of right to charge for sittings or of an assignment of pew-rents save as above was given.

The revising barrister found as a fact that there had been no assignment of pew-rents whatsoever to the said new church or vicarage or benefice, and was of opinion that neither the churchwardens nor the claimant had any legal right to reserve for money to be paid to the claimant any seats in the church, and that the price could not be recovered in an action; he also found that under the circumstances the churchwardens were the claimant's agents, and that the claimant and the churchwardens were acting in good faith, and that the letting was not unreasonable. Similar letting of seats outside the law was practised in several churches of new parishes in South London to the knowledge of the bishop and other ecclesiastical authorities, though in the greater number of new parish churches in South London there was no letting of seats. The parishioners did not contest or dispute the letting of seats by the claimant. The letting was likely to continue in the near future, and an income of over 10*l.* would continue to the claimant from that source.

The claimant occupied as owner the freehold land and the church building, and also occupied as tenant or owner a house in which he lived in the said parish (all within a parliamentary borough) of such value as would confer on him the right of voting at parliamentary and other elections for the borough in respect of the 10*l.* tenement qualification.

The claimant's case was based solely on the pew-rents.

It was contended by the objector that the pew-rents were unlawful, as there was no statutory or other proper authority or sanction for charging for the pews or sittings; that the income was in its nature too fluctuating and uncertain, and that under the circumstances there was no income or receipt, or no income or receipt sufficient in law, from land within the parish such as to entitle the claimant to a county parliamentary vote in respect thereof. In the alternative it was contended that

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the claimant was in the occupation of land alone, or land and building, of sufficient value to confer on him the borough vote, and that under s. 24 of the Reform Act, 1832 (1), he could not successfully claim the county parliamentary vote; that the subsequent statute exempting ecclesiastical buildings from rating did not affect the question, and that the claimant could not sever the property occupied by him as owner or tenant so as to get the two votes.

The revising barrister held (*a*) that the claimant's freehold land was of the value of 10*l*. a year and upwards, and that he had a yearly income of that amount from the land, and that the income was sufficient in law to confer the freehold vote, and (*b*) that he occupied the land within the meaning of s. 24 of the Reform Act; he accordingly disallowed the claim, and struck out the names of seven other persons whose names were on the ownership list of voters for the division, and who were duly objected to for the same reasons and under similar circumstances. The whole of the appeals were consolidated.

The question for the Court was whether the decision of the revising barrister was correct.

REEVE *v.* CLERK OF THE COUNTY COUNCIL OF SURREY.

The appellant had claimed a county vote for the Wimbledon Division in respect of his freehold benefice, St. Peter's, in the parliamentary borough of Croydon, and on objection the claim was disallowed.

The appellant was the vicar of St. Peter's, a new parish cut out of the ancient parish of Croydon pursuant to the Church Building Acts. The freehold of the church and vestry site and the surrounding yard and the church caretaker's house were vested in the appellant under the statute. The caretaker's house, which was detached from the church, was occupied rent free by the caretaker, and was rated at 16*l*., the rates being paid by the churchwardens. There was no residence for the vicar attached to the living, the vicar residing in a house

(1) Now known as the Representation of the People Act, 1832: see 59 & 60 Vict. c. 14 (The Short Titles Act, 1896).

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in the parish. The church and vestry buildings and the surrounding yard were used solely for the purposes of religious worship.

There were no burial fees in respect of burials within the parish. The vicar's income was in part 50*l*., a money grant from the Ecclesiastical Commissioners, and part from pew-rents, which amounted to over 600*l*. a year, subject however to the payment of a yearly sum to the previous vicar, and to the payment of the stipend of a curate. The pews were inclosed, and single seats were let, the letting being done by the churchwardens, who received the money; the amount of the pew-rents fluctuated, having been only 300*l*. a year at the time of the appellant's appointment as vicar. The parish was constituted about 1854 under the Church Building or New Parishes Acts; the Ecclesiastical Commissioners settled a scale of pew-rents and assigned pews to be let by the churchwardens, and directed the churchwardens how the pew-rents were to be dealt with. The churchwardens collected the money and paid the vicar. No documents, copies, or extracts were produced to the revising barrister.

The objector contended that the pew-rents were vested in or given to the churchwardens, that under the Church Building or New Parishes Acts the pew-rents could not be vested in the vicar of a new parish, and that outside the Ecclesiastical Commissioners and the persons referred to in 1 & 2 Will 4, c. 38, s. 4, there was no person or authority who could create or assign pew-rents in a new parish. He further contended that the income from pews was fluctuating; that it did not arise out of the freehold; that pew-rents in the present case were not ancient or customary income from a freehold such as would qualify for a vote. It was also argued that the vicar occupied his freehold land, and could not under s. 24 of the Reform Act, 1832, get a vote for the county in respect of the land he occupied in the borough, although the latter might not be rateable.

The revising barrister was of opinion that the pews or sittings at St. Peter's were let by the churchwardens, and that the rents were collected and expended by them as public

parish officials pursuant to statutory authority, and he held that in the present case, and in connection with the letting of pews and the collection and expending of the pew-rents, the churchwardens were not the agents or servants of the vicar. He also found that the amount which the churchwardens were able to hand the vicar yearly out of the pew-rents was not less than 200*l.* a year, and that the freehold land owned and occupied by the claimant (namely, the site of the church and the yard surrounding the church) brought him an income of over 10*l.* from pew-rents annually, and that the land was of that value clear of all outgoings. He held that the freehold land was of value sufficient in law to qualify the claimant for the county vote, but he also held that the claimant occupied his freehold land within the meaning of s. 24 of the Reform Act, 1832, and that it was of value sufficient to confer a borough vote in the parliamentary borough of Croydon; he accordingly disallowed the claim, and struck out the names of three other persons whose names were on the ownership list of voters for the division, and who were duly objected to for the same reasons and under similar circumstances. The whole of the appeals were consolidated.

The question for the opinion of the Court was whether the decision of the revising barrister was correct.

Daldy (*J. E. G. de Montmorency* with him), for the appellant. The appellant is entitled to be registered as a voter for the county in respect of his freehold benefice, notwithstanding that in respect of his dwelling-house he is also entitled to a borough vote. Sect. 24 of the Representation of the People Act, 1832, has no application to such a case as the present. The object of that section was to exclude freehold estate occupied by the owner within a borough, which by reason of its occupation might confer on him the borough franchise, from further conferring upon him a vote for the county. The case is not affected by the fact of the occupation by the appellant of a dwelling-house in another part of the borough, because, in order to give effect to s. 24, both the building and the land must be occupied as owner or as tenant under the

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same landlord: *Capell* v. *Aston Overseers* (1); *Burton* v. *Aston Overseers* (2); and it cannot be contended that the dwelling-house was held with the church and land by the appellant. The case for the respondent depends on whether the appellant can be said to occupy the church and surrounding freehold land in such a fashion as to entitle him in respect of such occupation to a borough vote. The occupation must be as owner or tenant; the appellant clearly does not occupy the church as tenant, and it is submitted that he does not occupy as owner; if he does, every vicar of a church situated in a parliamentary borough would be entitled to a vote for the borough in respect of the occupation of his church. It is clear that there is no actual physical occupation of the church, such as would be requisite in the case of a dwelling-house, and it is an actual or material occupation which is contemplated by the statute. The revising barrister has confused possession and occupation, and has treated mere possession as equivalent to occupation for the purpose of s. 24. The possession of a church is in the minister and churchwardens: *Griffin* v. *Dighton* (3), affirming the view expressed by Sir John Nicholl in *Jarratt* v. *Steele* (4); and this being so, it is not possible that the occupation should be in the minister alone. In an ordinary case, "the mere existence of ownership or tenancy, which is consistent with the right of possession, and, consequently, with the occupation being in another person by means of a sub-demise, cannot of itself constitute occupation": Rogers on Elections, i. 112; and the nature of the occupation must be the same in the case of a church as of an ordinary house. Legal possession does not of itself constitute an occupation: *Reg.* v. *St. Pancras* (5), per Lush J. The view of Bovill C.J. in *Beswick* v. *Alker* (6), that "a right to receive pew-rents is not an occupation of land" is conclusively in favour of the appellant's contention and should be followed in this Court. The various Church Buildings Acts shew that this

(1) (1849) 8 C. B. 1.
(2) (1849) 8 C. B. 7.
(3) (1864) 5 B. & S. 93.
(4) (1820) 3 Phillim. 167.
(5) (1877) 2 Q. B. D. 581, at p. 588.
(6) (1872) L. R. 8 C. P. 265, at p. 268.

church is placed upon the footing of an ordinary parish church. The occupation contemplated by s. 24 is such an occupation as will render the occupier liable to be rated to the poor-rate; but by 3 & 4 Will. 4, c. 30, s. 1, churches and district churches are exempted from liability to be assessed to the poor-rate; there cannot, therefore, be an occupation of the church by the vicar within s. 24 of the Act of 1832. Assuming, however, that the church comes within the category of "other building" in the expression "house, warehouse, counting-house, shop or other building" in s. 24, and assuming further that the appellant as vicar is in occupation of it, the appellant's claim is in respect of the profits of his benefice and not in respect of the occupation of land. The profits of a benefice derived from pew-rents are in the nature of a rent-charge, which is not capable of occupation. That pew-rents may confer a freehold interest entitling the vicar to a county vote was decided in the recent case of *Vickers* v. *Selwyn*. (1) [He also cited *Rex* v. *Ditcheat*. (2)]

Roskill, K.C. (*W. A. Casson* with him), for the respondent. The decision of the revising barrister was right, for the appellant was an owner occupying under conditions which would give him a borough vote. The freehold of a church is in the parson, and the churchwardens are under him; the possession of the whole church is in the incumbent, the churchwardens having only the custody of the church under the minister: Prideaux on Churchwardens, 91, 332. The question has arisen in rating cases, and in *Robson* v. *Hyde* (3) Buller J. said in the course of his judgment: "I am very far from being satisfied that a member of the Established Church, a parson or vicar, who has the profits of the pews given him by the parish in increase of his benefice, is not rateable for such profits"; this must mean that he is rateable by reason of his occupation of the benefice and his profits. The same test was applied in *Rex* v. *Agar* (4), where the trustees of a Methodist chapel, who received money annually for pew-rents, were held to be

(1) (1903) 52 W. R. 153; 89 L. T. 747.

(2) (1829) 9 B. & C. 176, 183.

(3) (1783) Cald. 310.

(4) (1811) 14 East, 256.

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rateable as occupiers for the profits, although these were in fact all expended upon the buildings and salaries. It is true that the appellant is not rateable in respect of the church, but this is by reason of the exemption of places exclusively appropriated to religious worship by the Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30); it does not affect the question of his being the occupying owner. Actual physical occupation is not required in order to confer the borough occupation franchise. It is wrong to say that the possession of a church is in the vicar (or minister) and churchwardens; it is legally in the vicar: see Phillimore's Ecclesiastical Law, 2nd ed. p. 1464; the possession of the churchwardens, if their right can properly be so described, is subordinate to the possession of the vicar, who can maintain trespass against them: *Jones* v. *Ellis*. (1) As to the extent of the occupation necessary to confer the borough franchise, the requirements of the statute have been held to be satisfied by the mere warehousing of goods upon the premises: *Daniel* v. *Coulsting*. (2) In *Beswick* v. *Alker* (3) the judgment was based solely upon the findings in the particular case, and reliance should not be placed upon the dictum of Bovill C.J., which was not necessary to the decision.

Daldy, in reply.

Cur. adv. vult.

1904. Dec. 19. The judgment of the Court (Lord Alverstone C.J., Kennedy J., and Ridley J.) was read by

KENNEDY J. The question for our consideration in the first case is whether the revising barrister was right in holding that the appellant "occupied" within the meaning of the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 24, the land situate within the parliamentary borough of Wandsworth, in respect of which, as a freehold of the requisite yearly value, the appellant has claimed to be placed upon the list of voters for the Wimbledon Division of the county of Surrey. The facts which are really relevant appear to us to be few. The appel-

(1) (1828) 2 Y. & J. 265, 274; 31 R. R. 589.

(2) (1845) 7 Man. & G. 122.

(3) L. R. 8 C. P. 265, at p. 268.

lant is the vicar of St. Thomas, Telford Park, Streatham. The vicarage was constituted by Order in Council dated July 9, 1903. The deed of consecration of the church is dated December 21, 1902. It recites the earlier deed bearing date March 30, 1899, whereby the land on which the church was afterwards built was conveyed by the donor to the Ecclesiastical Commissioners for the purpose of the Church Building Acts, and as the site appropriated to the then intended church; the building of the church, its intended enlargement, and the intended provision in the church, when enlarged, of 850 sittings, of which 300 should remain free and unappropriated. The appellant, as vicar, annually receives from the churchwardens for his own use and benefit the proceeds of pews which have been appropriated and let by them, to the amount of 40*l*. The churchwardens collect the pew-rents and deduct the cost of collection before making the payment of the receipts to the appellant. The case states the finding of the revising barrister that the churchwardens are the appellant's agents. The learned barrister appears to think that the collection of pew-rents in this church is illegal. We are not prepared to adopt this view. The Church Building Acts, beginning with 58 Geo. 3, c. 45, make provision for the letting of pews and the employment of funds so raised in the payment of the incumbent: see Cripps's Law relating to the Church and Clergy, 6th ed. pp. 412–419. The letting of sittings in this church, which was built under these Acts, was contemplated at the time of the deed of consecration, as appears from the recitals in that deed. It is true that neither in the deed nor in the Order in Council creating the parish do we find the special provisions relating to pew-rents (the settlement of a scale of pew-rents, the assignment of pews, and the application of the pew-rents) intended by the legislation of the Church Building Acts: cf. 58 Geo. 3, c. 45, ss. 77, 78. But if the point were material we should not find ourselves able, on this account, to hold that the collection of pew-rents in this church was contrary to law. The real question, however, which the case is intended to raise for our decision is whether or not the revising barrister was justified in disallowing the vicar's claim

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to a vote for the county on the ground that, within the meaning of the Reform Act, 1832, s. 24, he "occupied" the land—the land on which the church stands and the graveyard adjoining. As to this, the finding of the revising barrister as to the agency of the churchwardens for the appellant in regard to the collection and application of pew-rents does not appear to us to be material.

We are of opinion that the decision of the revising barrister should be reversed. The vicar has, no doubt, the legal possession of the freehold. He has, even as against the churchwardens, the right to the keys of the church: *Ritchings* v. *Cordingley*. (1) But to create an occupation there must be an actual as well as a legal possession. "Occupation includes possession as its primary element; but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it; but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year": per Lush J. in *Reg.* v. *St. Pancras*. (2) "Legal possession is not enough to make the appellant an occupier assessable to the poor-rate": per Lord Esher M.R., *Crowther Smith* v. *New Forest Union*. (3) Is the legal possession of the freehold in such a case as the present, coupled with the receipt of pew-rents, sufficient to create an occupation? No case has been cited to us which so decides. In *Beswick* v. *Alker* (4), which was, in regard to the material facts, practically identical with the present case, there are dicta which tend the other way. Bovill C.J. said (5): "There is nothing to shew that the respondent was in the occupation of any land. A right to receive pew-rents is not an occupation of land." We do not think that the judgment can be claimed by the appellant as a direct authority in his favour, because,

(1) (1868) L. R. 3 A. & E. 113.

(2) 2 Q. B. D. 581, at p. 588.

(3) (1886–90) Ryde's Rating Appeals, 311.

(4) L. R. 8 C. P. 265.

(5) L. R. 8 C. P. at p. 268.

according to the view of all the judges who heard the argument, they felt themselves somewhat cramped by the meagre statement of the case. "With the scanty information we have," said Brett J., "it must be taken that the claimant has such a freehold interest in these pew-rents as would entitle him to a vote for the county, but for the objection put forward by the appellant . . . . There is no statement here that the respondent occupies the church." Still, the dictum of Bovill C.J., that the clergyman's right to receive pew-rents—an interest which, in *Ex parte Arrowsmith, In re Leveson* (1), James L.J. described as "a profit arising from the use of the freehold," and Thesiger L.J. as "a profit derived from the benefice"—does not constitute an occupation of land is a weighty authority in the appellant's favour. For, unless such receipt of pew-rents constitutes occupation, it is difficult to see in what respect a person in the position of the appellant can be said to occupy the land on which the church stands, or to be more than merely its legal possessor. The respondent naturally relies upon the cases of *Robson* v. *Hyde* (2) and *Rex* v. *Agar*. (3) On the facts these cases are distinguishable from the present case. In neither did the land consist of the parson's freehold, but the question of rateability arose in regard to the interest coupled with the receipt of pew-rents in a non-parochial chapel; in the earlier, a building leased to trustees and used for services of the Church of England; in the latter, a Methodist chapel. The respondent relied mainly upon the dictum of Buller J. in the earlier of the two cases, which was decided in the year 1783: "His case does not resemble that of a clergyman. But, if it did, I am very far from being satisfied that a member of the Established Church, a parson or vicar, who has the profits of the pews given him by the parish in increase of his benefice, is not rateable for such profits." The language of the learned judge clearly shews that he was not intending to express a confident opinion; and we are by no means sure that rightly understood the dictum is really relevant to the matter we are considering. Clergy have always

(1) (1878) 8 Ch. D. 96. (2) Cald. 310.
(3) 14 East, 256.

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been rated for their tithes, and the learned judge may have meant that he was far from satisfied that, if a parish gave to the parson the pew-rents in addition to the tithe (or other payments or endowments in lieu of tithes), the amount upon which he should be assessed for rating purposes should not be correspondingly increased. In our view, the receipt of the pew-rents in the present case shews, as its amount exceeds 40*s.* a year, a value in the freehold from which the pew-rents arise, sufficient to entitle the appellant to the county vote in respect of his freehold, as was held by this Court recently in *Vickers* v. *Selwyn* (1), but does not, either by itself, or taken in connection with the fact of the appellant's legal possession of the land and of the church which stands upon the land, constitute an "occupation" of land within s. 24 of the Reform Act, 1832. Holding this view of the case, we do not think it necessary to express any opinion upon the point, which has been suggested, that the occupation mentioned in the section must be taken to mean an occupation of property in respect of which a person is liable to the payment of rates, and that, inasmuch as since the passing of the Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30), ss. 1, 2, a church such as the one in question is not such property, there cannot be an "occupation" of a church by the parson within the meaning of the Reform Act, 1832, s. 24.

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This also is an appeal from the decision of the revising barrister, who has disallowed the appellant's vote.

The circumstances, as appearing in the case stated by the revising barrister, are not in any substantial matter distinguishable from the circumstances of the case in which judgment has just been given, unless a distinction can be based upon the finding in the present case—that the pews were let and the rents collected by the churchwardens and expended by them as public parish officials pursuant to statutory authority, and not as agents or servants of the appellant. In our view, this matter is not really material, and in reversing the decision of

(1) 52 W. R. 153; 89 L. T. 747.

the revising barrister in the present case we have nothing to add to that which has been set forth in the judgment in the preceding case.

Appeals allowed.

Solicitors for appellants: *Ayrton, Biscoe & Barclay.*
Solicitors for respondent: *Russell Cooke, & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

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SIMPSON *v.* EBBW VALE STEEL, IRON, AND COAL COMPANY.

Employer and Workman—Compensation—"Workman"—Manager of Coal Mine paid by Salary—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

The certificated manager of a coal mine, who is paid a yearly salary, and who, although his duties require his presence in the mine, is not required to engage in manual labour, is not a "workman" within the meaning of the Workmen's Compensation Act, 1897.

APPEAL against the refusal of the judge of the county court of Monmouthshire to award compensation to an applicant under the Workmen's Compensation Act, 1897.

The respondents were the owners of several collieries in Monmouthshire, including one called the Prince of Wales Colliery, and the applicant was the widow of the certificated manager of that colliery, who had met with a fatal accident while discharging his duties underground. The deceased was appointed manager under the provisions of s. 20 of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), which enacts that "every mine shall be under a manager, who shall be responsible for the control, management, and direction of the mine." Besides the separate certificated managers of each mine, the respondents had also a general mining manager, who had the general control of all their mines, including the Prince of Wales Colliery, of which the deceased was the certificated manager. The remuneration of the deceased consisted of a

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salary of 400*l.* a year, payable monthly, a house rent free, and a free allowance of coal for his house. The deceased did no manual labour, nor was he required to do any. On December 4, 1903, there was a fall of roof in one of the workings, and while the deceased was in the mine in his capacity of manager for the purpose of inspecting the scene of the fall he met with the accident from which he died. The county court judge held that the deceased was not a workman within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and that therefore the applicant was not entitled to an award of compensation under the Act. (1)

The applicant appealed.

S. T. Evans, K.C., and *John Sankey*, for the applicant. The county court judge was wrong in finding that the applicant was not entitled to compensation. The manager of a colliery comes within the terms of the definition of a "workman" in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. That definition provides that the work of the "workman" need not necessarily be manual labour. The county court judge seems to have been too much influenced by definitions of the term "workman" in other Acts, such as the Employers' Liability Act, 1880, and the Employers and Workmen Act, 1875, which are in much narrower terms than that in the Workmen's Compensation Act, 1897. The manager of a mine has, under the Acts for the regulation of coal mines, to perform dangerous work of supervision underground in all parts of the mine, and it is submitted that he comes within the class of employees who were intended to be benefited by the Act. The mere fact that he is not paid weekly or fortnightly, and that his remuneration is larger than what is generally spoken of as wages, cannot be a ground for limiting the plain language of the definition so as to exclude him. If the county court judge was right, it is difficult to see where the line can be drawn; if

(1) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), s. 7, sub-s. 2, the term "workman" "includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing."

the manager of the mine is excluded, the same consideration would seem to apply to the under-managers. It is true that many of the provisions of the Act apply to what no doubt constitute the majority of the cases contemplated as likely to arise—that is, cases in which the workman is paid by weekly wages; but it was held in *Lysons* v. *Knowles* (1) that, if a person comes within the operative portion of the Act, the mere fact that the machinery given in the schedule is inapplicable to his case is not a sufficient reason for excluding him from the benefits of the Act. The amount of salary in the particular case cannot be the test; there are many small collieries in which the manager's salary would be a very small one. In *Wilson* v. *Merry* (2) the term "workman" is constantly used in the judgments in speaking of the manager of a mine. The "manager" is not in these cases the general manager or representative of the colliery owners.

[They also cited *Hedley* v. *Pinkney & Sons Steamship Co.* (3); *Vamplew* v. *Parkgate Iron and Steel Co.* (4)]

Ruegg, K.C., and *Albert Parsons*, for the respondents. The definition of "workman" in s. 7, sub-s. 2, must be read in connection with the general scope and the other provisions of the Act. It is obvious that some limitation must be placed upon the generality of the expressions used in the definition, otherwise the most absurd consequences would follow. According to the construction contended for by the applicant, railway managers or other officials with salaries exceeding a thousand a year would be included in the Act. The word "person" in the definition must be limited with reference to the class of employee that the general scope of the Act shews to have been in the contemplation of the Legislature. It may be difficult to draw the line, but that does not shew that no line should be drawn in the application of the definition. The terms of the definition were framed with a view to preventing too narrow a construction of the term "workman," e.g., a construction that would confine it merely to manual labourers, or to employment by way of service in the strictest sense; and they cannot fairly

(1) [1901] A. C. 79.
(2) (1868) L. R. 1 H. L., Sc. 326.
(3) [1892] 1 Q. B. 58.
(4) [1903] 1 K. B. 851.

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be taken to indicate an intention on the part of the Legislature that the Act should have so wide an application as would follow from the argument for the applicant. There are many provisions of the Act which indicate that the Legislature were contemplating a class of workers who may be described as belonging to the working class in the popular sense of that term—a wage-earning class. Such are the provisions of s. 1, sub-s. 2 (*a*), which speaks of two weeks' full wages; s. 3, which forbids contracting out, except under certain conditions; s. 5, sub-s. 1, which provides for payment of insurance money into the Post Office Savings Bank, and the provisions in the 1st schedule as to the assessment of compensation with reference to the amount of weekly earnings, and providing that the maximum amount of compensation shall be 300*l.* in case of death and 1*l.* a week in case of incapacity. It is clear upon the facts that the deceased was in the position of a vice-master to the men employed in the mine, and was not a mere servant in the same common employment with the rest of the men.

S. T. Evans, K.C., in reply.

COLLINS M.R. This case, which comes to us by way of appeal from the award of the county court judge, raises the question whether a person in the position of the deceased, who was a certificated manager in one of the mines of the respondents, comes within the definition or description of a person to whom the Workmen's Compensation Act, 1897, applies; in a careful and well-reasoned judgment the learned county court judge held that he did not fall within it. The title of the Act itself may have some bearing on the question we have to consider; it is, "An Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment." That shews us that the law which we are administering is that of the compensation of workmen, one or more statutes relating to which were previously in existence. Then s. 1 provides that, "if in any employment to which this Act applies, personal injury by accident arising out of and in the course of the employment is caused to a workman"; stopping there, the standard is that the person who is employed

and has met with an accident must be a workman, and it is consistent with this that he may be employed and yet not be a workman; that he must be a workman is a cardinal feature of the right to compensation. By the definition of "workman" in s. 7, sub-s. 2, that term includes "every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing"; the element of workman is not eliminated, although the description includes those engaged in an employment to which the Act applies, whether by way of manual labour or otherwise. This description makes it possible for a man to be a workman within the meaning of the Act, although he may not be engaged in manual labour. But the Act must be construed reasonably, and its main purpose is apparent on its face, although the definition makes it possible to apply it to a person not engaged in manual labour. He must, however, still be a workman—that is, though in popular language he is not engaged in manual labour, he must still be a workman. The cardinal idea of the Legislature, therefore, is that it is dealing with workmen, and the definition makes it possible to include in that term those otherwise conforming to its requirements but not engaged in manual labour. It would be easy to give instances of persons coming within or without the definition, and perhaps the genesis of the definition is, as Mr. Ruegg suggests, that a narrow construction had previously been placed on the word "workman," restricting it to persons engaged in manual labour, by which some persons were excluded who would in common parlance be included within the term; for instance, the conductor of a tramcar, who would generally be considered to be a workman, although his occupation is not one which involves manual labour to any extent. According to the standard of the man in the street, there would be no difficulty in including persons of that sort, in the receipt of weekly or monthly wages, in the term. But though the Act gives that extension to the term, it still leaves the person a workman. Are we to extend it so as to include a person whom no man of ordinary sense would so describe, unless he were

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forced to do so by Act of Parliament? Is it to include the solicitor of a railway company or the agent of an estate?—are such persons meant to be embraced under the term? Unless a limit is placed upon the word "workman" in the sense which I suggest, there seems to be no logical halting-place which would not embrace solicitors and estate agents under that term.

Now, does the Act itself give any indication of where the line is to be drawn? On going through the Act, it is obvious that its whole scheme rests on the fundamental interpretation that an ordinary person would put on the word "workman." It presupposes a position of dependence; it treats the class of workmen as being in a sense "inopes consilii," and the Legislature does for them what they cannot do for themselves: it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves. In no sense can such a principle extend to those who are earning good salaries. It is of course very difficult to draw the exact line, but it is easy in a particular case to say on which side of the line it falls.

A perusal of the sections of the Act makes it clear what classes it is intended to benefit. A very strong light is thrown on this point by the provisions of s. 1, sub-s. 2 (*a*) of which enacts that the employer is not to be liable under the Act in respect of any injury "which does not disable the workman for a period of at least two weeks from earning full wages." Such a provision could not be meant to apply to the case of a man who is paid a salary of 400*l*. a year and has a house rent free, and who might be paid treble as much; it is not addressed to such a case at all. Then we come to the enactments contained in the 1st schedule as to the amount of compensation, which in the case of temporary incapacity is not to exceed 20*s*. a week, and taken roughly represents a maximum of half the wages of the workman. Can it be supposed that the Legislature intended that to be the compensation for a man who might be earning thousands a year? Yet we must suppose so, if the definition clause is to be taken as covering every case that could be embraced in a grammatical construction of the

language used. Where then is the limit to be drawn? In my opinion it should be so drawn as to embrace the classes whose remuneration can properly be described as wages. The popular meaning must be given to a definition where we are confronted with such an expression as "wages," and we must interpret the Act as applying to persons whom ex hypothesi the Legislature regards as not being in a position to protect themselves. None of these considerations apply to the case of a person holding the position of a certificated manager of a colliery, who comes within a very different category from that of an ordinary workman. I do not say that a person in the position of the deceased is absolutely excluded from the possibility of coming within the Act, for it is possible that such a man might in fact work as a workman, though I do not know that such a contingency is at all probable; there might, however, be facts in a particular case from which the conclusion might be drawn that, although the man was a certificated manager, he was also a workman. So far as the facts have been found in the present case, the learned county court judge has found that he was not a workman, and the highest at which the appellant's case can be put is that there might be evidence that he was, although there is strong evidence that he was not. The county court judge was not bound to come to a conclusion contrary to common sense, and there was abundant evidence that the deceased was not within what the Act intended by the word "workman." It is impossible to lay down any absolute line, or to say that a judge must direct himself as to the line within which a man is a workman, so as to debar him from finding that, although the employment comes within the terms of the definition clause, the man is not to be taken as a workman when all the circumstances of the case are considered.

MATHEW L.J. I am of the same opinion, despite the strenuous argument that has been advanced on behalf of the appellant. It is said that to introduce a limitation on the description of "workman" in the Act is equivalent to legislation. But it seems to me that the Act of Parliament was

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intended for the protection of workmen, using that term in its ordinary and popular sense. From the title at the commencement of the Act, and all the way through it, there are ample indications to this effect. If we look at paragraph 1 (*b*) of the 1st schedule we see that the weekly payment in a case of total or partial incapacity is not to exceed 50 per cent. of the average weekly earnings during the previous twelve months, while paragraph 2 provides that in fixing the amount of the weekly payment regard is to be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident. This language is very significant, and it does not seem credible that by using the words "or otherwise" the Legislature meant to extend the benefit of the Act to every contract of service. We are bound no doubt to give effect to the language used in an Act of Parliament unless it leads to a manifest absurdity. The definition of "workman" in this Act includes every person engaged in an employment to which this Act applies, "whether by way of manual labour or otherwise": how is this to be construed? I think that the section means "manual labour, or labour involving physical exertion other than manual." Applying this to the facts of the present case, I am unable to see how the deceased can be brought within the Act; the fact that he was the superintendent of a colliery and was obliged in the course of his duties to descend the mine does not make him a workman. He is not a workman in the mine when he is there for the purpose of superintending and controlling its working. I think that this appeal fails.

COZENS-HARDY L.J. I am of the same opinion, and should be content to adopt the judgment of my Lord; but, having regard to the importance of this case, I think it better to add a few words. The case is one of considerable difficulty, arising from the very unhappy mode in which what is called a definition is framed. I doubt whether this is strictly a definition clause; it does not say that the word "workman" means certain things, but that it includes them, and that

renders it the more obligatory on us to consider what is the governing idea which runs through the Act. We start with the fact that there can be no liability without an employer; there must be a contract of service of some kind. But the Act is dealing with people who are ordinarily called workmen, and, remembering the governing idea, the effect of the clause is somewhat to enlarge the margin or ambit of the phrase, because it does not say that a man is not a workman if the labour which he performs is not manual. The definition uses the words "or otherwise"—a singularly unhappy phrase, for it would include an apprenticeship, which is necessarily a contract of service. It is not really a definition, but rather an indication that, in dealing with a word of common meaning, we are to include in the class of "workmen" people who on a narrow construction would be excluded from it. I cannot, however, think that Parliament intended to include in the term every person who had an employer, and to extend it to so very wide a class. Approaching the question with some common sense, I think that the ordinary and popular meaning should be given to the word "workman." In the present case the deceased was not paid by wages, but by a salary—a fact which, it is true, is not conclusive, for it is conceivable that there may be a workman who is paid by salary. The case is one which is very near the line; and I think it was competent to the county court judge to say that the deceased was a workman; but if the question is one of limitation, I should say that such a person was not necessarily included in the term. It is really in the nature of a question of fact for the county court judge, and it is impossible for us to differ from his holding.

Appeal dismissed.

Solicitors for appellant: *Metcalfe & Sharpe, for T. S. Edwards, Newport, Monmouthshire.*

Solicitor for respondents: *Percy Becher, for Vazie Simons, Pontypridd.*

W. J. B.

1905
Jan. 16.

In re FITZGEORGE.
Ex parte ROBSON.

Bankruptcy — Principal and Surety — Debenture of limited Company — Debenture Interest guaranteed—Dissolution of Company—Bankruptcy of Guarantor—Proof for future Interest—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 143.

A. guaranteed B. the regular payment of the interest payable under the debenture of a limited company until the principal sum secured by the debenture was repaid by the company. Some time afterwards the company went into liquidation and was dissolved by virtue of s. 143 of the Companies Act, 1862. Subsequently A. became bankrupt:—

Held, that, notwithstanding the dissolution of the company, B. was entitled to prove in A.'s bankruptcy for the estimated value of the future interest payable under the guarantee.

THIS was an appeal by a creditor against the rejection of his proof by the trustee in bankruptcy.

In August, 1892, the debtor, who was a director of a limited company, for good consideration gave to one Robson, the bonâ fide holder of a debenture for 3000*l.* issued by the company, his written guarantee "for the regular payment of the interest payable in respect of the said debenture until the repayment by the said company of the principal sum of 3000*l.* due thereon." The debenture was a floating charge and carried interest at the rate of 8 per cent. per annum, payable quarterly, and the conditions indorsed thereon provided (inter alia) that the principal sum thereby secured should immediately become payable if the company made default for twenty-eight days in the payment of any interest thereby secured, or if the company went into liquidation. In 1893 the company made default in payment of interest; and thereupon Robson enforced his debenture, which realized about 933*l.* In 1894 the company went into liquidation, and on July 25, 1895, the liquidator filed the usual notice under s. 143 of the Companies Act, 1862; so that on October 25, 1895, the company was dissolved.

From 1894 to 1902 Robson from time to time recovered judgments against the debtor for arrears of interest payable

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under the debenture and received payment; but in 1902 the debtor was adjudicated bankrupt, and the official receiver became the trustee in the bankruptcy. In January, 1903, Robson lodged a proof against the debtor's estate for 129*l.* 2*s.* 8*d.*, being the interest due under the debenture to that date; and he also claimed in his proof that the trustee should make an estimate of the liability of the debtor to pay future interest at 8 per cent. per annum on 2067*l.* (the balance of principal due on the debenture), and should admit the proof for the amount of that estimate. The trustee rejected the proof on the ground that the company had been dissolved, and that the debtor was no longer subject to any liability under his guarantee. Robson appealed.

It appeared from an actuarial valuation that 8 per cent. on 2067*l.* was equal to an annual sum of 165*l.*, which, if treated as a perpetual annuity, was, on the 4 per cent. tables, of the value of 4135*l.*; while to purchase a Government annuity of 165*l.* would require 6616*l.*; but if the debenture was treated as an 8 per cent. security the value was 2067*l.*, being the same amount as the principal due thereon.

Carrington, for the creditor. The company was discharged from all liability in respect of the principal debt, not by any act of the creditor, but by operation of law. The debtor, therefore, is not released from liability under his guarantee. The principle of *In re Jacobs* (1) and *In re London Chartered Bank of Australasia* (2) applies.

Hansell, for the debtor. The general law is not disputed, but the guarantee must be construed strictly. The debtor only guaranteed "the interest payable in respect of the debenture." The interest can only be payable so long as the principal debt is in existence to support the claim for interest. The "interest payable" means the interest payable by the company. The effect of the dissolution of the company is that the principal and interest are no longer payable by the company. Therefore the guarantee came to an end on the dissolution of the company. The parties could not have

(1) (1875) L. R. 10 Ch. 211. (2) [1893] 3 Ch. 540, 546.

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intended that the guarantor should take upon himself a perpetual liability. But if his liability continues, it should be valued on the basis of an 8 per cent. security, which on the evidence of the actuary would be 2067*l.* The creditor is not entitled to prove for the value of a perpetual annuity.

Carrington, in reply.

BIGHAM J. I think in this case that the creditor is entitled to prove for the value of the guarantee that the debtor has given. It is said that, because the principal debt is gone, therefore the liability under the guarantee to pay the interest on the debenture is also gone. I do not agree with that view. The principal debt is gone no doubt, but not by any act of the creditor. It is gone by operation of law. The principal debt will never be repaid, but in my opinion the obligation of the debtor to pay the interest under his guarantee remains. There must be a declaration that the creditor is entitled to prove for the estimated value of his security, and if necessary there must be a reference to the registrar to ascertain the amount.

Solicitors: *Paice & Cross; Tarry, Sherlock & King.*

NOTE.—After some discussion the estimated value of the future interest payable under the guarantee was agreed at 2067*l.*

H. L. F.

In re EASTGATE. *Ex parte* WARD.

1905 *Jan.* 17.

Bankruptcy—Sale of Goods—Fraud of Debtor—Vendor's Right to disaffirm Sale and retake Goods after Notice of Act of Bankruptcy—Title of Trustee in Bankruptcy.

Where a sale of goods is induced by the fraud of the purchaser, the vendor, on discovering the fraud, is entitled within a reasonable time to disaffirm the sale and retake possession of his goods, although he does so with notice of an act of bankruptcy on which the purchaser is subsequently adjudicated bankrupt; for in such a case the trustee in bankruptcy has no higher or better title than the bankrupt.

THIS was an application by the trustee in bankruptcy for the return of certain goods, or the value of them, under these circumstances.

In February, 1904, the debtor took a house at Sutton, and during March and part of April purchased goods on credit from the tradespeople in the neighbourhood without the intention (as it afterwards appeared) of paying for them. On April 20 the landlord distrained for rent and was paid out. On the same day a Mr. Bowling, one of the local tradesmen, who had supplied furniture and other articles to the debtor on credit to the value of some 11*l.*, issued a county court summons for the amount against him. On April 22 the debtor absconded, leaving the house locked up and taking the key with him. On April 27 Bowling, and other tradesmen who had also supplied the debtor with goods on credit, broke into the house with the assent of the landlord and removed such of their goods as they could find on the premises. In May a receiving order was made against the debtor on a creditor's petition based on the act of bankruptcy committed on April 22. Adjudication followed, and a trustee in bankruptcy was appointed. It was then found that the debtor had been carrying on a similar system at other places under other names, and in August he was arrested, prosecuted for fraud, and convicted. The trustee in bankruptcy now claimed from Bowling the return of the goods he had removed, or the value of them,

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on the ground that his title as trustee related back to April 22, and that Bowling had removed the goods with notice of the act of bankruptcy committed by the debtor on that day.

E. Clayton, for the trustee. There is no case in bankruptcy directly in point, and it is submitted that the analogy of the cases in the winding-up of companies applies. It is settled that where a contract to purchase shares in a company has been induced by fraud, the purchaser cannot rescind the contract after the commencement of the winding-up of the company: *Oakes* v. *Turquand* (1); *In re Hull and County Bank.* (2) In the next place, the evidence as to fraud is not conclusive. The mere fact that the debtor bought the goods without being able to pay for them is not a sufficient ground for retaking possession of them; and if the debtor left the goods with the intention of returning them to the creditors, that would be a fraudulent preference: *In re Fletcher.* (3)

S. G. Lushington, for Bowling. The evidence on the whole shews a fraudulent intent on the part of the debtor to obtain goods on credit at Sutton and other places without paying for them. It is settled that where the sale of goods is induced by the fraud of the buyer, the vendor, on discovering the fraud, can disaffirm the contract and recover his goods within a reasonable time: *Load* v. *Green.* (4) That is what was done here, and the trustee has no better title than the debtor. The company cases do not apply.

E. Clayton, in reply.

BIGHAM J. The question I have to determine in this case is whether at the time Mr. Bowling took possession of these goods they formed part of the bankrupt's estate. It appears that the bankrupt in February of last year took a house in the neighbourhood in which Mr. Bowling carries on business. He then began to make purchases in the neighbourhood of this house of the tradespeople round about on credit, and, in my opinion, he never had the least intention of paying for

(1) (1867) L. R. 2 H. L. 325.
(2) (1880) 15 Ch. D. 507.
(3) (1891) 9 Morr. 8.
(4) (1846) 15 M. & W. 216, 221; 71 R. R. 627.

any of those goods when he bought them. In other words, I think he pretended falsely to the persons from whom he got the goods that he intended to pay for them when in fact he did not intend anything of the kind, and in that way he got possession of the goods.

What was the position of the vendors of these goods? In my opinion their position was this. As soon as they discovered that he had bought the goods with no intention at all of paying for them, they were entitled to treat the contract as a contract induced by fraud—induced, that is to say, by a representation, which the purchaser knew to be untrue, that he meant to pay for the goods—and, being entitled to treat the contract as one induced by fraud, they were also entitled, within a reasonable time after they discovered the facts, to disaffirm the contract. The sales extended over a period from February to April 15. On April 20, as Mr. Bowling could not get his money, he proceeded in the county court to recover the price of the goods. He did not at that time know all the circumstances. But very soon afterwards he did know, because, on April 22, two days afterwards, the bankrupt shut up the house and absconded, and under the circumstances committed an act of bankruptcy. It was then, and not until then, that Mr. Bowling discovered that he had been defrauded. What did he do? In my opinion he then disaffirmed the contract, and did that which he was entitled to do, namely, took back his property. Now did the property at the time he took it back form part of the estate of the bankrupt? I do not think it did, and for this reason. I think that the trustee acquired the interest of the bankrupt in the property subject to the rights of third parties. One of those rights in this case was the right of the vendors of the goods to disaffirm the contract and to retake possession of the goods. I cannot say that I approve of the way in which possession was retaken in this case. But in my opinion Mr. Bowling was only taking, though taking it in a wrong way, that which was his own. That being so, I think the application of the trustee must be dismissed.

Solicitors: *Spence, Gibson & Co.; Parker, Garrett & Parker.*

H. L. F.

1905
Jan. 20.

TURNER *v.* WILLIS.

Solicitor—Bill of Costs—Cross-claim by Client—Account stated not in Writing.

Where, a solicitor having a claim against his client for costs, and the client having a cross-claim against the solicitor, the parties agree upon the amounts of their respective claims and state an account shewing a balance in the solicitor's favour, an action may be maintained by the solicitor for that balance, notwithstanding that he had delivered no detailed bill, and that the agreement for the settlement of the cross-claims was not in writing.

Appeal from the Whitechapel County Court.

The plaintiff was a solicitor, and the defendant had been a client of the plaintiff's firm. On August 23, 1900, the plaintiff's firm sent to the defendant a summary of the work done by them for him in connection with a variety of different matters extending over a period of fourteen years from 1881 down to 1895. The work in respect of which the claim was made was partly contentious and partly non-contentious. The summary, which contained a rough statement of their aggregate charges in respect of the different matters, but no detailed items, was accompanied by a letter in which they said, "We shall be pleased to make a considerable deduction from it, and if you will give us a call we can no doubt arrange the matter satisfactorily to you." According to the plaintiff's evidence the defendant called on August 24, and saw the plaintiff and his partner (since deceased), when the items of the bill of costs were fully gone into with the defendant. The defendant had a cross-account against the plaintiff's firm for work done, which he then produced. After the two accounts had been discussed, it was arranged that credit should be given to the defendant for his account, and reductions made in the plaintiff's firm's account, and a balance was struck at 35*l.* to be paid by the defendant to the plaintiff's firm in settlement of all matters between them. This agreement, however, was not in writing.

The defendant having failed to pay the said sum of 35*l.*, the

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plaintiff in August, 1904, brought the action in the county court upon the above agreement of August 24, 1900, and upon an account stated. The county court judge held, upon the close of the plaintiff's case, first, that the plaintiff's claim was barred by the Statute of Limitations, which ran from the dates of the work done; and, secondly, that the agreement sued on was an agreement by a client to pay his solicitor a lump sum in discharge of past costs and was not binding on the client, not being in writing; and he accordingly entered judgment for the defendant. The plaintiff appealed.

Nield, for the plaintiff. The Statute of Limitations does not apply, for where two parties having cross-accounts against one another go through the accounts and agree upon a balance in favour of one of them, this operates as mutual payment to the amount of the smaller account, and gives rise to a new consideration for the payment of the balance, so that the statute commences to run afresh from the date of the agreement: *Ashby* v. *James*. (1) This fact, that there was a new consideration for the payment of the 35*l*., affords an answer to the other ground also upon which the judge decided against the plaintiff. He proceeded upon the authority of *In re Russell, Son & Scott* (2) and *In re West, King and Adams* (3), in the former of which it was held that since the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), an oral agreement by a client to pay his solicitor a lump sum in discharge of past costs for contentious business was not binding on the client; and in the latter, that under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), the same rule applies with respect to non-contentious business. But in those cases there had been nothing more than the mere agreement by the client to pay; there had not been any settlement of cross-accounts giving rise to a new consideration. That distinguishes those cases from the present.

D. Warde, for the defendant. It has long been settled law that a solicitor cannot recover the amount of his bill of costs

(1) (1843) 11 M. & W. 542; 63 R. R. 676.

(2) (1885) 30 Ch. D. 114.

(3) [1892] 2 Q. B. 102.

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on an account stated, though the amount has been admitted, without proof of the delivery of the bill: *Eicke* v. *Nokes* (1); *Brooks* v. *Bockett* (2); and here there was no proper detailed bill. It can make no difference that there was here a cross-account of the client. The balance remaining in the solicitor's favour is not on that account any the less a claim for solicitor's costs. The object of the Act requiring the delivery of a detailed bill before action is to give the client an opportunity of having the bill taxed. But that object would be defeated if the solicitor were allowed to recover in such a case as the present. He might send in a bill for an excessive amount, and the mischief would be as great in respect of the balance remaining after allowance of the client's cross-account as in respect of the total bill.

LORD ALVERSTONE C.J. In this case I think there must be a new trial. We cannot express any final opinion as to the rights of the parties until the facts are ascertained. That must depend upon what the nature of the account stated was. If it turns out that it consisted of entries on both sides, and that the parties agreed the amounts of those cross-claims, and a balance was struck, I think the action upon an account stated might well be supported. But if on the other hand there was no cross-claim by the defendant, and the statement of account merely consisted in the agreement of the amount of the solicitor's bill, then I think that that would not suffice. The county court judge decided against the plaintiff on the ground that the agreement was an agreement by a client to pay his solicitor a lump sum for past costs, and ought to have been in writing. But upon the evidence as it stood I do not think that was so. It was a bargain, not with respect to solicitor's costs alone, but with regard to cross-claims, one side of which consisted of solicitor's costs; and that, in my opinion, is not the kind of bargain which is required to be in writing. But as the defendant's witnesses have not been heard, the case must go back for a new trial to enable the real facts to be ascertained.

(1) (1834) 1 Mood. & Rob. 359. (2) (1847) 9 Q. B. 847.

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KENNEDY J. I am of the same opinion. I think that the objection to this claim would be a good one if all that happened was that an unsigned bill of costs was sent in, and the account stated was merely a settlement of that bill. But here the plaintiff's evidence went to shew that the account was stated with reference to the balance of two cross-claims, one of which had nothing to do with a solicitor's bill. The case of *Scadding* v. *Eyles* (1) is inferentially an authority in favour of the view that under those circumstances the claim would be good. It was there held that to a count on an account stated it was a good plea that the account was stated solely of and concerning charges for work done as an attorney, and that no bill was delivered. Mr. Peacock, for the plaintiff, there assumed that it would not be a good plea that the account was stated partly in respect of attorney's charges, saying that "it cannot be said that if, in point of fact, the accounts had been cast up, and a balance struck, a defendant might reopen them if one item related to law proceedings"; and from the form of the plea this assumption does not seem to have been disputed by the other side.

RIDLEY J. I am of the same opinion.

Order for new trial.

Solicitors for plaintiff: *G. Vandamm & Co.*
Solicitors for defendant: *Metcalfe & Storr.*

(1) (1846) 9 Q. B. 858.

J. F. C.

1905
Jan. 20, 23.

HARGROVES, ARONSON & CO. *v.* HARTOPP AND ANOTHER.

Negligence—Landlord and Tenant—House let in Flats—Liability of Landlord for Disrepair of Roof—Limits of Duty.

The plaintiffs were tenants of a floor in a building of which the defendants were landlords. A rain-water gutter in the roof, the possession and control of which was retained by the defendants, became stopped up. Notice of the stoppage was given by the plaintiffs to the defendants, but the defendants neglected to have the gutter cleared out till after the lapse of four or five days from the receipt of the notice, and in the meantime the plaintiffs had suffered damage by reason of rain-water having found its way into their premises in consequence of the stoppage:—

Held, that the fact of the gutter being under the control of the defendants imposed upon them a duty to take care that it was not in such a condition as to cause damage to the plaintiffs, and that as they had notice of its being stopped up and neglected to clear it out within a reasonable time after the receipt of the notice, they were guilty of a want of due care, and were consequently responsible for the damage done.

APPEAL from the City of London Court.

By an agreement in writing dated November 14, 1902, the defendants, who were the owners of a building situate in Foster Lane, Cheapside, let the third floor of the building to the plaintiffs for a term of two years. In part of the premises so let to the plaintiffs the third floor was the highest floor of the building; in another part there was a fourth floor above the plaintiffs' premises. On October 22, 1903, the plaintiffs found that rain-water was coming into their premises through the roof, and they immediately gave the defendants notice of that fact. The defendants did not send any one to repair the leakage until October 27, when they found that it was due to a rain-water gutter having become stopped up by an accumulation of rubbish, the greater part of which had been thrown by the tenants of the floor above on to the roof below. In the meantime, however, considerable damage had been done to the plaintiffs' goods in consequence of the rain-water flowing into their premises. Neither the roof nor the gutters or rain-water pipes were demised by the plaintiffs, but were retained by them

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in their possession and control. The defendants had never caused the gutters and pipes to be periodically examined and cleaned out, and the rubbish which caused the stoppage of the gutter was the accumulation of years. There had been a leakage in the roof in the preceding July. The plaintiffs' agreement of tenancy did not contain any express covenant by the defendants to repair the roof or gutters, but it contained a covenant for quiet enjoyment without disturbance by the landlords or any other person claiming through them.

The plaintiffs sued the defendants for breach of the contract of tenancy, and also for negligence in failing to clean the gutter out after notice. The judge gave judgment for the plaintiffs.

The defendants appealed.

Holman Gregory, for the defendants. The judge has held that the defendants were liable for negligence in not cleaning out the gutter with sufficient speed after receipt of the notice. But to establish negligence it must first be shewn that there was a duty. The mere giving of notice could not create a duty. Notice could only be material as giving occasion for the discharge of a duty which already existed aliunde. Here no duty to keep the roof in proper condition arose from contract. There was no express covenant by the defendants to repair; nor can any covenant by the defendants to keep the roof and gutters in repair be implied. In *Carstairs* v. *Taylor* (1), where the nature of the letting was similar and the rain-water flowed from the roof on to the floor rented by the plaintiffs in consequence of a rat having gnawed a hole in a box into which the water was collected by the gutters, it was held (inter alia) that the defendant was not liable on the ground of any implied covenant. In the present case no doubt the agreement contained a covenant for quiet enjoyment; but that will not avail to support the plaintiffs' claim, for that covenant only applies to positive acts done by the landlords, not to omissions, and here the only positive act done, that of throwing the rubbish on to the roof, was the act of third persons, for whom the defendants were not responsible. Nor, apart from contract,

(1) (1871) L. R. 6 Ex. 217.

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can any duty to keep the gutters clear arise by law from the fact of the defendants being in the possession and control of the gutter. The maxim "Sic utere tuo ut alienum non lædas" applies only to responsibility for acts of commission, not to mere omissions. The law in no case imposes a duty upon a landowner to prevent injury arising from a dangerous condition of things existing upon his premises, unless that condition of things was brought about by his active interference. And here it was not, but was the result of the acts of third persons. In the American case of *Krueger* v. *Ferrant* (1), where the plaintiff rented and occupied the lower story of the defendant's building, which was let out in floors to different tenants, and the roof, as here, was under the control of the lessor, who had notice that it was defective and nevertheless neglected to repair it, it was held that he was not responsible to the plaintiff for damage which he suffered in consequence of that neglect by reason of rain-water coming through the roof. The Court there held that the maxim "Sic utere tuo" did not apply "to a mere omission to act, but rather to some affirmative act or course of conduct which amounts to or results in the invasion of another's right." That case is directly in point. The plaintiffs will rely on the case of *Miller* v. *Hancock* (2), where the lessor of a building let out in flats was held to be under a duty towards persons coming to visit tenants of the flats on business to see that the common stair of the building was reasonably safe. But there the duty held to exist was a duty towards third persons, not towards the tenants themselves, and the obligation was rested by the Court, not on any implied contract, but on an invitation to persons coming on business to use the stair. If tenants do not insist on getting a special covenant in their leases, they must take the risk of the roof getting out of repair.

Sturges, for the plaintiffs. There was a duty upon the landlords to take reasonable care that the roof which they retained under their control did not become a source of danger to their tenants. No doubt in the absence of a covenant by the landlord to repair he is under no duty to the tenant to

(1) (1882) 43 Amer. Rep. 223; 29 Minn. 385. (2) [1893] 2 Q. B. 177.

prevent those portions of the building which are demised, and control of which is parted with to the tenant, from getting into a state of dangerous disrepair. But it is otherwise with respect to those portions of the building which he retains in his own possession. The case of *Miller* v. *Hancock* (1) is a direct authority in the plaintiffs' favour. There the Court assumed as an indisputable proposition that there was a duty on the landlord as towards the tenants to keep the staircase safe, and the only question was whether the benefit of that duty extended to third persons who were strangers to the contract of tenancy. Bowen L.J. said: "It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants." So here, as the premises cannot be enjoyed for the purpose for which they are demised unless the roof is maintained in a proper condition to keep out the rain, it must have been intended that the landlords should maintain it in that condition, and for that purpose should keep the gutters clear. The case of *Carstairs* v. *Taylor* (2) is not an authority against the present contention. What the Court there held was, not that there was not an implied covenant by the landlord to keep the gutters in repair, but that the covenant did not extend to provision against inevitable accident. Martin B. expressly said that "Probably the defendant was under a liability to use reasonable care in keeping the roof secure." In *Blake* v. *Woolf* (3) the plaintiff became tenant of the ground floor in the defendant's house in which there was a cistern on an upper floor. The cistern leaked, and the defendant having notice of it employed a competent plumber to repair it. Owing to the negligence of the plumber an overflow occurred and damaged the plaintiff's goods. It was held that as he had instructed a competent

(1) [1893] 2 Q. B. 177. (2) L. R. 6 Ex. 217.
(3) [1898] 2 Q. B. 426.

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plumber to do the work he had exercised due care, and was not bound to do more. But the ground of the decision shews that if he had not exercised due care the Court would have held him liable. The case of *Krueger* v. *Ferrant* (1) was wrongly decided.

Gregory, in reply.

LORD ALVERSTONE C.J. In this case, which raises a point of some interest, I have come to the conclusion that upon the facts as found by the county court judge we ought not to interfere with his decision. Those facts I understand to be as follows: The roof was not demised to the plaintiffs, but was retained in the possession and under the control of the defendants, and there was no evidence that the plaintiffs or any of the tenants had any right of access to the roof or any privilege to go upon it, or that they had in fact ever repaired it or cleaned out the gutter. In October, 1903, the damage which is complained of happened as the result of a gutter in the roof becoming stopped up. The plaintiffs gave the defendants notice of the leakage, but the defendants delayed five days before taking steps to have the stoppage removed. There was also evidence that there had been a previous leakage in the roof in the preceding July. The county court judge found that the gutter was not clear on that occasion, and that in fact the defendants had never inspected the gutters at any time; and under those circumstances he held that the defendants were liable for negligence in not periodically inspecting the gutters, and in not acting sufficiently quickly after receipt of the plaintiffs' notice in October.

Mr. Gregory has contended that the judge was wrong in holding the defendants liable for negligence; that in order to establish negligence it must first be shewn that there was a duty to take care; that there is no duty upon a lessor to take care that the roof is kept in a fit and proper condition unless he has covenanted to repair; that no covenant by the lessor to repair is to be implied; and that, apart from covenant, no duty to take care is imposed by law except in respect of acts of commission, under which

(1) 43 Amer. Rep. 223.

head a failure to keep a gutter clear could not be included. It may be that a covenant by the landlord to repair is not to be implied in respect of those portions of the premises which are actually demised to the tenant. It is enough to say that that is not this case. Here the gutter was not demised. And the question is whether under those circumstances the landlord is not under a duty to take reasonable care to prevent a gutter which is under his control from becoming stopped up, whereby damage may happen to the occupants of the floors below. I think there is, and that there being evidence of a failure to discharge that duty, inasmuch as the defendants never inspected the gutters, and delayed the repairs even after receipt of the notice, they are liable for the damage which ensued. Even if it were true as contended that in such a case no duty to take care can arise, independently of covenant, except in respect of acts of commission, I think that here the defendants were guilty of an act of commission. A person who maintains an artificial thing like a gutter, used for the very purpose of carrying off the rain-water from the roof, in an improper condition after notice may be said to be guilty of an act of commission, and he is, in my opinion, under a duty to take care that as a result of that act no damage happens to the occupants of the house. The decision in *Carstairs* v. *Taylor* (1) assumes the existence of such a duty. There the plaintiffs were tenants to the defendant of the ground floor of a warehouse, the upper part of which was occupied by the defendant. The water from the roof was collected in a box, from which it was discharged into the drains. The defendant from time to time examined the box to see that it was in fit condition. Owing to a rat having gnawed a hole in the box the water escaped into the plaintiffs' floor and did damage. It was held that, as the water was conducted to the place from which it escaped as much for the benefit of the plaintiffs as for that of the defendant, the latter was not under an absolute duty to prevent its escape at all hazards, but only under a duty to take care, and that as the accident was one against which no reasonable care could have provided the

(1) L. R. 6 Ex. 217.

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HARGROVES, ARONSON & Co. v. HARTOPP.

Lord Alverstone C.J.

defendant was not liable. The Court started with the assumption that the narrower duty existed. Bramwell B. said: "Here the plaintiffs must be taken to have consented to this collection of the water which was for their own benefit, and the defendant can only be liable if he was guilty of negligence." And Martin B. said: "Probably the defendant was under a liability to use reasonable care in keeping the roof secure, but he cannot be held responsible for what no reasonable care and vigilance would have provided against." In *Miller* v. *Hancock* (1) the actual decision was that the defendant was liable to a person not a tenant for allowing the common stair to get into a defective condition whereby the plaintiff suffered damage, and I was at first inclined to think that the liability of the lessor in such a case was confined to third persons and did not extend to the tenants themselves. But on consideration I think that the Court did assume that the lessor was under a duty to his own tenants, as well as to members of the public coming there on business, to take care to keep the staircase in reasonable safe repair. Indeed, the language of Bowen L.J., where he says "The landlord has given the tenant a right to use the staircase and undertaken to keep it in repair," goes further, and seems to suggest that the duty which is to be implied in such a case is coextensive with that which is created by an express covenant to repair—that is to say, that it is an absolute duty to keep the premises in a safe condition at all events, and not merely a duty to take reasonable care to keep them safe. I much doubt whether that wider standard of liability could be supported; but it is not necessary to decide that question here, for there is here abundant evidence of a want of care.

KENNEDY J. I agree, and for the same reasons.

RIDLEY J. I am of the same opinion.

Appeal dismissed.

Solicitors for defendants: *Church, Adams & Prior.*
Solicitor for plaintiffs: *C. Haddon Gray.*

(1) [1893] 2 Q. B. 177.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
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Jan. 30.

HORNER *v.* FRANKLIN.

County Court—Jurisdiction—Landlord and Tenant—"Factory"—Means of Escape in case of Fire—Requirement of Sanitary Authority—Cost of Compliance—Contribution by Occupier—Covenant by Occupier to pay "Outgoings"—Owner's Right of Action—Factory and Workshop Act, 1891 (54 & 55 *Vict. c.* 75), *s.* 7, *sub-s.* 2.

Sect. 7, sub-s. 2, of the Factory and Workshop Act, 1891, provides that the sanitary authority shall serve on the owner of any factory which is not provided with proper means of escape from fire a notice specifying the measures necessary for providing such means of escape, and requiring him to carry out the same before a specified date; and thereupon the owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirement; and that, if the owner alleges that the occupier ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court, and thereupon that court, after hearing the occupier, may make such order as appears to the court just and equitable under all the circumstances of the case.

The lessees of a factory covenanted that they would during the term "pay all the existing and future taxes, sewers rates, and rates, assessments, and outgoings of every description for the time being payable by the landlord or tenant in respect of the demised premises (the landlord's property tax alone excepted)."

The landlord expended money in complying with the requirements of the sanitary authority under the above section, and then brought an action in the High Court against the tenants on their covenant, to recover the sum thus expended:—

Held, that the effect of s. 7, sub-s. 2, was to exclude the jurisdiction of the High Court, and that the action could not be maintained, the only remedy of the landlord being by means of an application to the county court.

Semble, that in determining what is "just and equitable" the county court judge must take into consideration (inter alia) the terms of the tenancy, expressed or implied.

Decision of Darling J., [1904] 2 K. B. 877, affirmed.

The Court of Appeal expressed no opinion as to whether the expenses in question were an "outgoing" within the lessees' covenant.

APPEAL from the decision of Darling J. (1)

The question was, whether the lessor of a factory, who had expended money in complying with the requirements of the

(1) [1904] 2 K. B. 877.

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sanitary authority under s. 7, sub-s. 2, of the Factory and Workshop Act, 1891, could sue the lessees, upon their covenant to pay "outgoings," to recover the amount so expended.

By a lease dated May 3, 1890, the plaintiff demised to the defendants two warehouses, situate at the rear of No. 27, Lamb Street, Spitalfields, for a term of twenty-one years from March 25, 1890, at the annual rent of 60*l*. The lease contained a covenant by the defendants that they would during the term of the lease "pay all the existing and future taxes, sewers rates, and rates, assessments, and outgoings of every description for the time being payable by the landlord or tenant in respect of the said demised premises (the landlord's property tax alone excepted)."

The lease also contained a covenant by the plaintiff that, within one month of the execution of the lease, he would brick up, in a proper and workmanlike manner, two doorways leading from the demised premises into 27, Lamb Street, and into a stable-yard respectively. This covenant had been duly performed by the plaintiff.

The premises demised were used by the defendants for the purposes of their business in connection with other adjoining premises in their occupation, and constituted a "factory" within the meaning of the Factory and Workshop Acts.

On February 7, 1901, the plaintiff was served by the London County Council, who were the sanitary authority, with a notice under seal under the Factory and Workshop Acts, 1878 to 1895, requiring him as owner of the premises to carry out certain work at the premises, so as to provide means of escape in case of fire. The work in question consisted in part of opening up the two doorways which had been bricked up by the plaintiff in accordance with his covenant, and of providing an external staircase. The plaintiff complied with the notice, and spent 185*l*. 12*s*. in executing the requisite works. In this action he sued the defendants to recover that sum as being payable by them under the terms of their covenant. (1)

(1) By the Factory and Workshop Act, 1891, s. 7, sub-s. 1, "Every factory of which the construction is commenced after January 1, 1892, and in which more than forty persons are employed, shall be furnished

Darling J. was of opinion that the expenses in question were "outgoings" within the meaning of the lessees' covenant. But he held that by s. 7, sub-s. 2, the jurisdiction of the High Court was excluded, and the only remedy of the lessor was by means of an application to the county court as provided by that section. The action on the covenant could not be maintained, and it was accordingly dismissed.

The plaintiff appealed.

Avory, K.C., and *A. H. Poyser*, for the plaintiff. It is submitted that the provision of s. 7, sub-s. 2, that the owner "may apply to the county court," applies only to a case in

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with a certificate from the sanitary authority of the district in which the factory is situate that the factory is provided on the storeys above the ground-floor with such means of escape in case of fire for the persons employed therein as can reasonably be required under the circumstances of each case . . . ."

By sub-s. 2, "With respect to all factories to which the foregoing provisions of this section do not apply, and in which more than forty persons are employed, it shall be the duty of the sanitary authority . . . . to ascertain whether all such factories within their district are provided with such means of escape as aforesaid, and in the case of any factory which is not so provided, to serve on the person being within the meaning of the Public Health Act, 1875, the owner of the factory, a notice in writing specifying the measures necessary for providing such means of escape as aforesaid, and requiring him to carry out the same before a specified date; and thereupon such owner shall, notwithstanding any agreement with the occupier, have power to take such steps as are necessary for complying with the requirements . . . . If the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the county court, after hearing the occupier, may make such order as appears to the Court just and equitable under all the circumstances of the case."

[NOTE.—The above section was repealed by the Factory and Workshop Act, 1901; but s. 14 of the latter Act contains similar provisions. The Act of 1901 was not passed until after the proceedings in the present case were commenced.]

By s. 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, ... or who would so receive the same if such lands or premises were let at a rack-rent."

"'Rack-rent' means rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises."

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which there is no contract between the owner and the occupier as to the incidence of expenses of this kind, or at any rate the provision only means that the owner may if he chooses to do so apply to the county court. He is not deprived of his right to sue the occupier in the High Court upon his covenant. When the section says "notwithstanding any agreement with the occupier," it is referring to the lessor's ordinary covenant for quiet enjoyment in a lease, and it enables the lessor, notwithstanding that covenant, to enter on the demised premises and execute the work required by the sanitary authority. It is submitted that the Legislature could not have intended without express words to take away the right to sue on the tenant's covenant. It is only said that the owner "may" apply to the county court, not that he "shall" or "must" apply. And indeed the condition precedent to the jurisdiction of the county court does not exist; the owner does not "allege" that the occupier ought to bear the expense or to contribute to it. He says to the tenant, "You are liable upon your covenant." In the County Court Act which gave county courts jurisdiction up to 50*l.* it is not said that an action may not be brought in the High Court for an amount less than 50*l.* The right to sue in the High Court is limited only by the power to allow costs on the county court scale, and by the power to remit the action to the county court. In *Shephard* v. *Barber* (1) it was held by Lawrance J. that, notwithstanding s. 7, sub-s. 2, a landlord could sue his tenant in the High Court upon his covenant to pay "outgoings," and that s. 7, sub-s. 2, applied only when there was no contract between the lessor and the lessee. In *Monk* v. *Arnold* (2) the King's Bench Division held that the county court had jurisdiction to apportion the expenses between lessor and lessee as might seem just and equitable to him under all the circumstances of the case, notwithstanding that the lessee had covenanted to pay all "outgoings"; but there the landlord had himself applied to the county court. The observations of Channell J. in that case (3) were mere obiter dicta. They were not adopted by the

(1) (1892) 67 J. P. 238; 1 L. G. R. 157. (2) [1902] 1 K. B. 761.
(3) [1902] 1 K. B. at p. 767.

other learned judges. If the owner chooses the county court as his tribunal, the judgment of that Court could be pleaded as res judicata; but if he chooses to go to the High Court he can recover on the tenant's covenant.

[VAUGHAN WILLIAMS L.J. I can hardly think the Legislature intended that there should be two tribunals to deal with the same matter.

ROMER L.J. And one of the tribunals being hampered by the ordinary rules of law, while the other is left at large to consider what is just and equitable under all the circumstances of the case.]

But this would be quite logical if the section applies only when there is no agreement between the parties. In *Gouldstein* v. *Hollingsworth* (1) the only question really decided was that expenses of this nature were within a lessee's covenant to pay "outgoings." But the Court also said that if the landlord had been ordered to pay a part of the expenses, he could sue the tenant on his covenant for the amount so paid. In *Morris* v. *Beal* (2) the Court followed *Gouldstein* v. *Hollingsworth* (1), and Lord Alverstone C.J. said (3) that when the tenant had covenanted to pay the expenses the question of what was just and equitable did not arise. The object of the section was to give a remedy to the landlord in cases in which he was not protected by a covenant of the tenant.

[ROMER L.J. Suppose there was no express contract by the tenant on this subject; there would be some implied liability on his part. Does not s. 7, sub-s. 2, mean that the landlord is to apply to the county court, notwithstanding any agreement by the tenant, express or implied, as to the payment of outgoings?]

It is contended that the landlord is not compelled to apply to the county court; he can go there if he chooses. If he does not choose to go to the county court, the High Court can deal with the matter.

[VAUGHAN WILLIAMS L.J. When a statute confers a right and also gives a remedy, primâ facie that remedy is the only one: *Vestry of St. Pancras* v. *Batterbury*. (4)]

(1) [1904] 2 K. B. 578.
(2) [1904] 2 K. B. 585.
(3) [1904] 2 K. B. at p. 591.
(4) (1857) 2 C. B. (N.S.) 477.

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In this case it is a new obligation which is imposed, and the landlord had already a remedy by action on the tenant's covenant, expressed or implied. The section merely requires the landlord to pay the expense in the first instance, and extends the jurisdiction of the county court as to amount. It does not deprive the landlord of any legal right which he has to recover from the tenant what he has paid.

Danckwerts, K.C., and *R. Cunningham Glen*, for the defendants. It should be observed that the greater part of the term granted by the lease has expired, and that is a material element in considering how it would be just and equitable that those expenses should be borne as between landlord and tenant.

What did the Legislature contemplate? The word "owner" is defined by reference to s. 4 of the Public Health Act, 1875. The Legislature must have contemplated a lawful owner and a lawful occupier. There must have been some contract, either expressed or implied, by virtue of which these expenses would fall on either the landlord or the tenant. If the Legislature had intended that the contract should necessarily prevail they would have said so distinctly. This they have not done. It may be conceded that if there was an express contract that these particular expenses should be borne either by the landlord or the tenant the Court could not look any further. The Legislature may have thought it right that there should be an equitable adjustment.

If necessary, it is submitted that the jurisdiction of the High Court has been deliberately ousted.

[ROMER L.J. It may perhaps be said that it never arose.]

It is submitted that this expense is not an "outgoing" within the covenant.

[They were stopped on this point.]

Avory, K.C., in reply. The Legislature could not have intended that the county court judge acting as an arbitrator should have power to decide who is to bear these expenses, unfettered by any right of appeal and contrary to the express terms of the covenant. If the covenant in the lease provided that the tenant should bear all the expenses imposed by s. 7,

sub-s. 2, on the landlord, then, if the decision is right, the county court judge could still say it was just and equitable that the tenant should pay only half.

[ROMER L.J. At law either the landlord or the tenant is liable for these expenses; the section must therefore mean that, notwithstanding the terms of the tenancy, the county court shall determine how it is just and equitable that the expenses shall be borne.]

If the factory is erected after January 1, 1892, this expense falls on the tenant. And by s. 81 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), the occupier was made liable for such an expense.

It is submitted that s. 7, sub-s. 2, does not exclude the jurisdiction of the High Court, but that it only gives an additional remedy to the owner. If it had been intended that the jurisdiction of the county court should be exclusive, one would have expected to find that a corresponding right to apply to the county court had been conferred on the occupier.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Darling J. was quite right and should be affirmed.

The action is brought by a lessor upon a covenant by the lessees contained in a lease dated May 3, 1890. [The Lord Justice read the above covenant, and continued :—]

I will assume for the purpose of my judgment that which Darling J. decided, that the word "outgoings" would be wide enough generally to cover any expenditure which the landlord was called upon by a local authority under their statutory powers to incur in respect of the demised premises. But I think that, making that assumption, Darling J. was quite right in dismissing this action. In my judgment he can only have dismissed the action upon the ground that it ought not to have been brought in the High Court, and that he had no jurisdiction to try it.

Now Darling J. expressed his reasons in a very forcible judgment, but he summed it up at the end in a very few words, which to my mind express the whole case. He said (1):

(1) [1904] 2 K. B. at p. 885.

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"The Act has placed the expense of making the alterations on the owner, and the only remedy which he has over against the occupier is that given by the Act, namely, by applying to the county court." That is my view of this Act. This section of the Act, as it seems to me, provides that the owner shall in the first instance, on the order being issued by the sanitary authority, do certain work at his own expense. Having said that, the section goes on to provide in effect that the owner shall have a remedy over against the occupier, and it proceeds to state what that remedy is. He shall have a remedy over against the occupier if in the discretion of the county court judge it is just and equitable that he should have it.

The words of s. 7, sub-s. 2, and in particular the words "if the owner alleges that the occupier of the factory ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court having jurisdiction where the factory is situate, and thereupon the county court, after hearing the occupier, may make such order as appears to the Court just and equitable under all the circumstances," as it seems to me, plainly throw this statutory obligation of doing this work and incurring this expense upon the owner, and he has to bear it.

Then comes the statutory remedy over which is given to him, and the question is whether the Legislature can possibly have intended that the owner, to whom they have given this remedy over, should in respect of this statutory obligation be able to bring an action against the occupier to enforce a covenant which would shift the obligation from the owner to the occupier. I cannot think that the Legislature can have intended that. As has been pointed out in the course of the argument, if that were true it would be possible for a landlord, even though he had been to the county court and had got an apportionment of the expenses which he did not like, or had been refused any contribution from the tenant, to proceed to bring an action against the tenant on the covenant. I asked counsel what plea there would be in defence to such an action, and although they attempted to suggest a possible defence I could see none. In my judgment the intention of the statute

was that the expenses of this duty to the public which the statute imposes should be borne by the owner, except to the extent to which he could relieve himself of it by making an application to the county court to order the tenant to bear the whole or part of the expenses. Mr. Avory, who has argued this case with his usual ability, found himself at last in a position in which he elected to base his argument upon this—that he asked us to construe the section as if it were qualified by a proviso that the jurisdiction of the county court was not to be exercised in any case in which there was a contract or covenant between the owner and the occupier which determined the incidence of these statutory expenses without the necessity of an application to the county court. The answer is that which my brother Romer gave, namely, that, if you have a lawful owner and a lawful occupier, there must of necessity be some contract, expressed or implied, which will determine the rights and liabilities inter se of the owner and occupier as regards such expenses. That is especially so when we bear in mind the definition of an "owner" in s. 4 of the Public Health Act, 1875, as the person receiving or entitled to receive a rack-rent equal to two-thirds of the full net annual value of the premises. In my opinion, therefore, it is impossible so to construe the section.

Then it is said that we ought not to construe the section as Darling J. has done, because it would in effect give to a county court judge a power which no judge ought to have, namely, a power of nullifying altogether a contract solemnly entered into between a landlord and his tenant as to the incidence of these expenses. My answer is, that this construction of the section can stand perfectly well without any such inference being drawn. No one has suggested that when the county court judge comes to consider what is "just and equitable" he is not to bear in mind the terms of the tenancy or of the occupation as between the owner and the occupier. It may be that those terms are such that it would be "just and equitable" to throw the whole burden of these expenses on the tenant. This being so, I cannot see that there would be any defeating or nullifying of the terms of the tenancy because

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the decision of the question of who is ultimately to bear and in what proportions the expenses of fulfilling this statutory obligation is left to the county court judge.

I only wish to add that, if the considerations which I have just mentioned are borne in mind, I can see no difficulty in understanding the observations of Channell J. in *Monk* v. *Arnold*. (1) In my judgment the matter may be put very shortly by saying that in this sect. 7, sub-s. 2, the word "may" really means "must."

In my opinion the judgment of Darling J. should be affirmed, with costs.

ROMER L.J. I am of the same opinion. After reading and considering the section in question I have come to the conclusion that the meaning and effect of it is this—that it casts upon the owner the obligation of paying in the first instance the expenses referred to, but provides, on the other hand in his favour that, if he wishes on any ground to obtain contribution or recoupment from the tenant, he must apply to the county court for relief, the county court judge being empowered to "make such order as appears to the Court just and equitable under all the circumstances of the case." In my opinion the last words of the section give a power to the county court judge which the High Court would not have had if jurisdiction had remained with it. The High Court would have had to determine the question strictly according to the terms of the tenancy—that is, by the obligations cast on the tenant as between him and the landlord by the terms of the tenancy, expressed or implied. In my opinion the Legislature did not intend that the terms of the tenancy alone should determine this question, nor did they draw any distinction between those terms when expressed in the form of covenants and when implied by law. Nor can I for this purpose see any distinction between those two cases. The Legislature, if they had so intended, could easily have provided that the right as between the owner and the occupier to contribution or recoupment should depend on the ordinary law, but that it should be

(1) [1902] 1 K. B. at p. 767.

decided by the county court according to that ordinary law. In my view the Legislature have not done that. By this section the county court judge, when the matter comes before him, is entitled—I think I may say is bound—to consider the terms of the tenancy; but he is certainly also entitled, and in my judgment he is bound, according to the very words of the section, to consider what may appear to him to be "just and equitable under all the circumstances of the case," and "all the circumstances of the case" cannot, as I have already said, be confined to the terms of the tenancy. I appreciate and approve of the observations made by Channell J. in *Monk* v. *Arnold* (1), which have been already referred to by my Lord. If the jurisdiction of the High Court in such a case as this was not ousted, there would be two different jurisdictions dealing with the same question between the same parties on different footings, the one bound to decide the point strictly according to the terms of the tenancy, the other, according to the very words of the Act, having a large discretion, and being entitled to do what is "just and equitable under all the circumstances of the case." In my opinion, in such a case as this, whenever the owner desires to have contribution or recoupment from the occupier, he must apply to the county court with its large general jurisdiction, and cannot come to the High Court.

I desire to add that, with regard to *Gouldstein* v. *Hollingsworth* (2) and *Morris* v. *Beal* (3), I reserve to myself the right to consider the grounds on which those cases were decided when they come properly before us for consideration.

STIRLING L.J. I am of the same opinion. It was contended in the first place by Mr. Avory, in his able argument on behalf of the appellant, that s. 7, sub-s. 2, applies only in the absence of any provision between the owner and occupier of the factory as to the incidence of these expenses. The answer, it appears to me, is that which has already been given, namely, that in all cases in which there is a legal relationship

(1) [1902] 1 K. B. at p. 767. (2) [1904] 2 K. B. 578.
(3) [1904] 2 K. B. 585.

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Stirling L.J.

between an owner and an occupier there is, either expressly or by implication, some provision which decides the question one way or the other. It must be borne in mind that this sub-s. 2 applies to what may be termed old factories—factories which came into existence, or the construction of which was commenced, before January 1, 1892. I cannot think that that is the true construction of sub-s. 2.

In his reply I think Mr. Avory rather departed from that position, and suggested that sub-s. 2 confers an additional remedy on the "owner," for it is the "owner" to whom this remedy is given. But if the owner were entitled to sue the occupier in the High Court for the whole of the expenditure which is cast upon him by this sub-section, to the High Court he would of course go. He would not think of submitting himself to the jurisdiction of a county court judge, who would be able to take all the circumstances of the case into consideration, and to make "such order as appears to the Court to be just and equitable." He would only adopt this remedy when his legal right was doubtful or non-existent. On the other hand, when by the existing legal rights the burden falls on the occupier, there is no corresponding right of applying to the county court given to him. He is left to bear what may be the injustice of a large expenditure at a time very near the expiration of his tenancy. I refer to this as an example. Considering such matters as these, I come to the conclusion that the better construction of s. 7, sub-s. 2, is that which has been put upon it by Darling J., namely, that it places the burden of this expenditure upon the owner and leaves him to bear it, unless he is relieved from it to any extent by the county court judge, if he thinks fit to do so after hearing all the circumstances of the case.

In my opinion this is the right construction of the Act, and consequently the High Court has no jurisdiction to entertain the action.

Appeal dismissed.

Solicitors: *E. Betteley; Syrett & Sons.*

W. L. C.

WILSON AND ANOTHER, APPELLANTS *v.* JUSTICES OF CREWE, RESPONDENTS. (1)

1905
Feb. 1.

Licensing Acts—Licence—Inn—Change of Occupation—Transfer of Licence—Jurisdiction of Justices—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14.

By s. 4 of the Alehouse Act, 1828, justices are given jurisdiction in special sessions to license by way of transfer "persons intending to keep inns theretofore kept by other persons being about to remove from such inns."

By s. 14, "If any person so licensed"—that is, duly licensed under the Act—"shall remove from or yield up the possession of the house specified in such licence," the justices may transfer the licence "to any new tenant or occupier of the house having so become unoccupied."

The licence-holder of an inn having become bankrupt, the premises were assigned to W., who applied at the general annual licensing meeting for a renewal of the licence to him. The renewal was granted, but the justices at the same time stated that W. was not a fit and proper person to hold the licence, and that they only granted it on the terms that he would not sell liquor under it, but would proceed to transfer it to some one else. W. occupied the house by putting furniture into it, and he let some of the rooms for club meetings, but he sold no liquor there. He subsequently applied at special sessions for a transfer to S., he having in the meantime given up possession to S.:—

Held, that the fact of the justices having stated at the time of granting the licence to W. that he was not a fit and proper person to hold it did not prevent the grant from being valid, and that consequently W. was at the time of the application for the transfer a "person so licensed" within the meaning of s. 14; that the requirement of s. 4 that the person removing from the licensed premises should, as a condition of the exercise of jurisdiction under that section, have theretofore kept them as an inn, applies as well to a case in which the licence-holder has already removed from the house at the date of the application for the transfer, as to one in which he still remains in possession at that date, but that W. had sufficiently kept the premises as an inn to satisfy the provisions of the section, notwithstanding that he had sold no liquor there; and that under the circumstances the justices had jurisdiction to grant the transfer to S.

Reg. v. *Cotham*, [1898] 1 Q. B. 802, distinguished.

CASE stated by the quarter sessions for the county of Chester.

On March 8, 1904, an application was made at the general annual licensing meeting for the borough of Crewe by H. J.

(1) The expressions "appellants" and "respondents" in this report refer to the parties who were respectively appellants and respondents before the quarter sessions.

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Wilson for a renewal licence by way of transfer authorizing him to apply for an excise licence to sell intoxicating liquors by retail at the fully licensed house known as The Earl of Chester's Own Inn. At the date of the application the then holder of the licence was A. W. Derbyshire, who had become bankrupt, and whose trustee in bankruptcy appeared and assented to the application. Wilson had received the key of the premises on March 7, and had thereupon during the occupation of Derbyshire placed a quantity of furniture in the house, and had given directions to painters to paint the premises, which they proceeded to do, and he subsequently to Derbyshire's occupation let rooms in the house for the periodical meetings of certain benefit clubs which had been in the habit of meeting there during Derbyshire's occupation; but Wilson never slept on the premises, and except as above stated had not occupied them as a dwelling-house or as licensed premises.

The application was refused by the licensing justices. Notice of appeal was duly given, and the appeal was heard at the general quarter sessions for the county of Chester on April 6, 1904. The quarter sessions allowed the appeal, and granted Wilson the licence sought; but in giving their judgment they intimated that Wilson was not a fit and proper person to hold the licence, that they granted the licence because having regard to the wants of the neighbourhood it was inadvisable that the licence should be lost, and that they did so merely as a temporary arrangement on the understanding that Wilson should not sell under the licence, and that at the earliest practicable moment an application should be made to the justices to transfer it to some one else. The order of the quarter sessions granting the licence was on April 16 forwarded by the clerk of the peace to the clerk of the licensing justices.

On April 19 an application was made to the licensing justices on behalf of W. K. Spencer for temporary authority to sell at the said premises, and the application was refused.

On June 28 application was made to the licensing justices by Wilson to transfer the licence in respect of the said inn to the said W. K. Spencer. An agreement for the tenancy of the

house had been signed by Spencer on April 5, and possession had been given to him on June 27. The justices refused the application on the ground that they had no jurisdiction to grant it. (1)

From that refusal Wilson and Spencer appealed to the quarter sessions, and the appeal was heard on October 19. At the hearing the facts above set out were admitted or proved, and it was also proved that Wilson never in fact sold intoxicating liquors at the said inn under the licence or otherwise. It was contended for the licensing justices that under the above circumstances Wilson was not, and never had been, the holder of the licence, and that as matter of law there was no existing licence vested in Wilson which it was competent for them to transfer. The quarter sessions overruled this contention, and found that the above facts constituted in law possession of the licensed premises by Wilson at the time when the application for the transfer to himself was made, and that he remained in possession until he yielded up the same to Spencer. They accordingly allowed the appeal, and ordered the licence to be issued to Spencer subject to a case for the opinion of the Court.

Low, K.C., and *Ellis Griffith*, for the licensing justices, the respondents to the appeal before the quarter sessions. The

(1) By the Alehouse Act, 1828, s. 4, special sessions are to be appointed "at which special session it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns as they the said justices shall . . . . deem fit and proper persons."

By s. 14, "If any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or shall become bankrupt . . . .; or if any person so licensed . . . . shall remove from or yield up the possession of the house specified in such licence . . . . it shall be lawful for the justices assembled as aforesaid at a special session . . . . to grant to the heirs executors or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt, ... or to any new tenant or occupier of any house having so become unoccupied . . . . a licence to sell exciseable liquors by retail to be drunk or consumed in such house."

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application for the transfer of the licence from Wilson to Spencer, which was refused by the licensing justices and granted by the quarter sessions, was an application under s. 14 of the Alehouse Act, 1828, which section provides that "if any person so licensed . . . . shall remove from or yield up possession of the house specified in such licence . . . . it shall be lawful for the justices . . . . to grant . . . . to any new tenant or occupier of any house having so become unoccupied . . . . a licence." Sect. 4 also deals with the case of successive occupation and the grant of a licence to the new occupier; but the distinction between the two sections is this—that whereas under s. 14, in order to give the justices jurisdiction, it is necessary to shew that the licence-holder has already removed from the house, and the house has "so become unoccupied" at the date of the application for the transfer, s. 4 applies to a case in which the licence-holder is "about to remove from such inn," and still remains in occupation at the date of the application. Here the application was made to the justices on June 28, Wilson having already parted with the possession of the premises to Spencer on the preceding day, June 27; so that the case comes within s. 14—not within s. 4. But the justices had no jurisdiction under s. 14 to grant the licence to Spencer unless the person who had removed from possession of the house, namely, Wilson, was a "person so licensed." But Wilson was not a person duly licensed. The quarter sessions had indeed in April issued a licence in which the name of Wilson appeared as grantee, but in the very judgment in which they ordered the licence to be issued they stated that he was not a fit and proper person to hold a licence, thereby stating a fact which went to the root of their jurisdiction, for by s. 1 of the Act of 1828 the justices have power to grant licences only "to such persons as they the said justices shall . . . . in the exercise of their discretion deem fit and proper." The licence consequently which was granted to Wilson was an absolute nullity, being granted to a person not qualified to hold it. It was as though the justices had granted a licence to a felon and recited the conviction for felony in their order. The quarter sessions

admitted that their object in issuing the licence was to prevent the premises from becoming unlicensed, and that they only issued it for the purpose of its being transferred to somebody else; in other words, they granted the licence, not to Wilson, but to the house, which licence was thereafter to attach to some person not then ascertained. But that is a thing which they had no power to do. A licence cannot be "in a state of suspended animation": per Lord Herschell L.C. in *Freer* v. *Murray*. (1) "A licence involves the idea of a person who is to be the license-holder": per Collins M.R. in *Tower Justices* v. *Chambers*. (2) If, however, the respondents are wrong in saying that the case does not come under s. 4, there is a further objection to the jurisdiction to grant the transfer to Spencer, for under s. 4 the justices are only to license "persons intending to keep inns theretofore kept by other persons being about to remove from such inns"; and here the premises could not be said to have been theretofore kept as an inn by Wilson, who was about to remove from such inn. Wilson had never kept the house as an inn, for he had never sold liquor there, and the essential characteristic of an inn, in the sense in which that term is used in the Licensing Acts, is that it is a place where intoxicating liquor is sold. It is that and nothing else. As soon as liquor ceases to be sold upon premises they cease to be kept as an inn. In *Reg.* v. *Cotham* (3) one Wallace, a person whose licence it was sought to transfer, had held a licence for the sale of liquor on the premises for some years prior to the date of the application for the transfer, but no intoxicating liquors had been sold there for thirteen years, and he had not occupied the premises for any purpose for upwards of ten years, the premises having been let to a tenant who used them as a draper's shop. It was held under those circumstances that Wallace had not kept the premises as an inn, and that consequently the justices had no power to grant a transfer under s. 4. That case is a direct authority in favour of the respondents.

Marshall, K.C., and *Trevor Lloyd*, for the appellants. The

(1) [1894] A. C. 576, at p. 583. (2) [1904] 2 K. B. 903, at p. 913.
(3) [1898] 1 Q. B. 802.

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application for the transfer of the licence to Spencer did not refer in terms either to s. 4 or s. 14: it was made generally under both sections. The objections to the allowance of the transfer are ill-founded. Wilson was a "person so licensed," for a licence had in fact been granted to him, although the quarter sessions apparently had doubted whether they ought to grant it, and strained a point in his favour in so doing. And being licensed he "kept" the inn. He occupied the house and used it as an inn so far as he could. In *Reg.* v. *Cotham* (1) the transferor had never occupied the premises in any way. The justices are not deprived of jurisdiction to transfer by the fact that liquor has not been continuously sold on the premises down to the time of the application, for the application may be made even after the licence has expired: *Reg.* v. *Justices of Liverpool* (2); *Baldwin* v. *Justices of Dover*. (3)

LORD ALVERSTONE C.J. In this case, which is one of some difficulty, two points have been raised with respect to the jurisdiction of the licensing justices to grant a licence to Spencer under ss. 4 and 14 of the Alehouse Act, 1828: the first being whether the inn had been "theretofore kept" by Wilson within the meaning of s. 4; and the second being whether Wilson was a "person so licensed" within the meaning of s. 14. In my opinion those two sections are to be read together, and are not to be treated as separate and independent enactments dealing with different subjects-matter, and that to bring a case within the operation of s. 14 it is essential to shew that the premises were theretofore kept as an inn within s. 4. Now it was contended by Mr. Low that the case of *Reg.* v. *Cotham* (1) lays it down as a general principle that, if for a substantial time preceding the application for a transfer the premises have not been kept as an inn, the justices have no jurisdiction to grant the transfer. The facts here were not in dispute. Derbyshire became bankrupt in February. The key of the house was given to Wilson on March 7. He occupied

(1) [1898] 1 Q. B. 802. (2) (1883) 11 Q. B. D. 638.
(3) [1892] 2 Q. B. 421.

the house by putting furniture into it, and he let rooms periodically to clubs which met there, but he never at any time sold any liquor there. He made an application to the licensing justices at the general annual licensing meeting for a renewal to him of Derbyshire's licence, and that application was refused. On appeal the quarter sessions granted the licence, the grant being on the face of it to Wilson, but they at the time told him that he was not a fit and proper person to hold the licence, and that the renewal was merely granted to prevent the licence from dropping, and in order that an application might be made for a transfer to a proper person. The premises were then assigned and possession of them given to Spencer, and an application was made at special sessions to transfer the licence to Spencer. The justices refused upon the ground that they had no jurisdiction. From that refusal an appeal was brought, and the quarter sessions allowed the appeal subject to the present case for our opinion. The first question which we have to consider is whether or not the case is governed by *Reg.* v. *Cotham*. (1) If I had come to the conclusion that the Court in that case had meant to lay down as a principle that any substantial interruption of the sale of liquor upon the premises, any substantial interruption of the keeping of the premises as an inn, in the sense of a place where liquor is sold, was a bar to the exercise of the jurisdiction under these sections, I should have felt bound to follow their ruling. But I cannot help thinking that they decided that case with reference to its special facts. There one Wallace, the person whose licence it was proposed to transfer, had held a licence in respect of the premises for some years, but he had not only never sold any liquor under his licence, he had never even occupied the premises in any way; he had let them to a tenant who had used them as a draper's shop, and it was treated by the Court as an extravagant suggestion that upon the tenant going out of occupation the jurisdiction under s. 4 could be invoked. The premises had never been kept as an inn, and Wallace was not about to remove from an inn. But here the facts are very different. The premises were transferred to Wilson as an inn,

(1) [1898] 1 Q. B. 802.

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and he occupied them. He obtained a qualified licence in respect of them as an inn, and, except for the fact that he did not sell liquor there, he purported to carry on the business of an inn, letting rooms for meetings of clubs. On those facts I am of opinion that at the time of the application for the transfer of the licence to Spencer, Wilson had theretofore kept the premises as an inn, and that no objection upon that point could be properly taken to the justices' jurisdiction. It remains to consider the second question—whether, having regard to what the quarter sessions said at the time that they granted Wilson his licence, he could be said to be a "person so licensed" within s. 14. In my opinion he was a licensed person. The quarter sessions had in fact granted him a licence, and the qualification that he should not use it for the purpose of selling liquor under it did not make it any the less a licence which was capable of being transferred. It was granted for the very purpose that he should transfer it. I think, therefore, that this objection to the jurisdiction also fails, and that the decision of the quarter sessions must stand.

KENNEDY J. I am of the same opinion. I cannot see any real ground for doubt about the relation of ss. 4 and 14. Sect. 4 provides for there being special sessions, which are popularly spoken of as transfer sessions, although it is not a very accurate phrase. Sect. 14 specifies circumstances under which the justices may act under s. 4. That being the relation of the two sections, you cannot read the one without reference to the other. Sect. 4, which constitutes the tribunal which may, "in the cases and in the manner and for the time hereinafter directed," grant transfers, is referring to the various cases afterwards specified in s. 14, and says that the jurisdiction is given for the purpose of licensing "persons intending to keep inns theretofore kept by other persons being about to remove from such inns." That being the purpose, those words of s. 4 must be read as qualifying the power of transfer in the cases mentioned in s. 14. The justices must upon such an application as the present ascertain that the transfer applied for is the transfer of a licence from a person who has been keeping

the premises, to which the licence relates, as an inn. In this case, then, I must see whether there is in the facts evidence of the keeping of an inn the licence for which a person about to remove from the inn which he had been keeping wished to transfer to another who was intending to keep the inn. The proposed transfer was from Wilson to Spencer. It was objected by the appellants that Wilson was not a person who could properly be regarded as having kept an inn. I do not think we ought to give those words an unnecessarily narrow meaning, or to regard the words "about to remove" in s. 4 as limiting the jurisdiction to the case of an application made where the transferor is still physically in possession at the moment of the application. It seems to me that what amounts to keeping an inn is a question of fact in each case. I think there was evidence upon which the justices were entitled to find that Wilson had kept the premises as an inn. He was a person in whom the licence had vested by the act of the magistrates. He did not, it is true, sell liquor on the premises, because the licence had been granted upon the understanding that he should not do so, but he nevertheless became the licensed occupier of the premises, and he occupied them as an inn in this sense, that he used them for certain purposes for which an inn would be used, such as the holding of club meetings there. He certainly occupied the premises for no other purpose than that of an inn. I need hardly say that those facts are very different from the facts in *Reg.* v. *Cotham.* (1) There the holder of the licence had never occupied the premises for many years: somebody else had occupied them and kept them, not as an inn, but as a draper's shop. The other question raised by the appellants was whether Wilson ever had a licence to be the subject of transfer because of the terms under which the licence was granted to him. No doubt it is strange that the justices should have granted a licence even for a temporary purpose to a person who, as they at the same time intimated, was unfit to hold it. It may be that they were wrong in doing what they did; but the fact remains that they did grant the licence, and what they said at the time of the

(1) [1898] 1 Q. B. 802.

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grant cannot make it the less a grant so far as the grantee's rights to transfer are concerned.

RIDLEY J. I am of the same opinion. In the course of argument I was much pressed with the case of *Reg.* v. *Cotham*. (1) The facts of that case, however, when carefully examined, are widely different from those in the present case, and it must be largely a question of fact in each case whether the house was theretofore kept as an inn by a person about to remove from it. There the house was never kept as an inn by any one, nor was the licence-holder a person about to remove from it, for he had never occupied it. Therefore clearly the facts of that case did not bring it within the language of s. 4. But here I think there was sufficient ground upon which the justices might fairly arrive at an opposite conclusion. The inn was never deserted as an inn. There was no actual break in the possession of the inn, and, although it was not actually used for some time for the purpose of retailing intoxicating liquor, it was continued to be used as an inn so far as the circumstances of the case permitted.

Order of quarter sessions affirmed.

Solicitors for appellants: *A. & J. E. Fletcher, Northwich.*

Solicitor for respondent justices: *E. W. & B. Beal, for C. E. Speakman, Crewe.*

(1) [1898] 1 Q. B. 802.

J. F. C.

CRICK *v.* NICHOLLS.

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Feb. 1.

Weights and Measures—Coal—By-law—Sufficiency of Weighing Instrument—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 28, *sub-s.* 1; *s.* 35.

A by-law made under s. 28 of the Weights and Measures Act, 1889, provided that every person carrying coal for sale in a vehicle should carry therewith "a correct weighing instrument . . . . for the purpose of weighing any quantity of coal not exceeding two hundredweight." The respondent, a coal dealer, was carrying bags of coal in his cart for sale, some of which bags purported to contain one hundredweight, and others half a hundredweight. He had with him a correct set of scales, but only one weight weighing half a hundredweight:—

Held, that the by-law and statute contemplated that the weighing instrument should be capable of weighing any bag of coal in the cart by a single operation, and that as a hundredweight bag of coal could not be weighed with a half-hundredweight weight in less than two operations, a breach of the by-law had been committed.

CASE stated by justices for the Bridgwater Division of the county of Somerset.

The respondent Nicholls was a coal dealer, and on April 22, 1904, in the parish of North Petherton in the said county, he was conveying coal for sale by retail in a cart. In the cart he had some bags of coal made up, some half-hundredweights, and some hundredweights, the majority being half-hundredweights. The respondent was delivering coal at North Petherton on that day in the ordinary course of business. He had a weighing machine with him in the cart which was correct and duly stamped by a qualified inspector of weights and measures, but he had only one weight, which was a half-hundredweight weight. By a by-law of the Somerset County Council, duly made and published in January, 1893, under s. 28 of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), it is provided that "Every coal dealer shall provide, and every person employed by him, who shall convey or carry out coal for sale by retail or for delivery to a purchaser from or out of any vehicle, shall constantly carry therewith a correct weighing instrument

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stamped by an inspector for the purpose of weighing any quantity of coal not exceeding two hundredweight."

An information was laid by the appellant, an inspector of weights and measures for the county council of Somerset, against the respondent for a breach of the said by-law.

At the hearing it was contended for the respondent that, as it was possible to weigh a hundredweight bag in two portions, it was a sufficient compliance with the by-law to have a half-hundredweight weight and nothing more. On the other hand it was contended for the prosecution that it was incumbent on the respondent to have sufficient weights to weigh at one time two hundredweight of coal if a purchaser required that amount, or at all events that he was bound to have in his possession weights to the extent of one hundredweight, seeing that he had bags of coal for sale of one hundredweight in weight.

The justices held that the respondent had sufficiently complied with the by-law, and dismissed the summons subject to a case for the opinion of the Court.

Garland, for the appellant. The expression "weighing instrument" in the by-law must be understood to mean what it is defined to mean in the Weights and Measures Act, 1889, under which the by-law was made. By s. 35 of that Act, "'Weighing instrument' includes scales with the weights belonging thereto." Here, as the respondent was required by the by-law to have a weighing instrument for weighing any quantity of coal not exceeding two hundredweight, and had bags of one hundredweight on his cart, he was bound to have with him a hundredweight weight to enable any inspector who stopped the cart to weigh one of the larger bags in a single operation. The justices thought it was enough if the man was able to turn the coal out of the bag and weigh it in bulk. But the object of the Act was to make provision for enabling the inspector to weigh the coal rapidly and conveniently—that is, in the bag or sack.

[LORD ALVERSTONE C.J. Might the respondent not have done that here by weighing first one of his half-hundredweight bags, and then using that as a second weight?]

No; because if that were sufficient it would be enough to say that the man might pick up and weigh half a hundredweight of stones from the side of the road, whereas the instrument which he is required to carry is scales with the weights "belonging thereto." [He referred to *Houghton* v. *Andrews*. (1)]

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. I am naturally very reluctant to interfere with the decision of the justices in a case like this, as it might be thought that the prosecution savoured of oppression, but I think that the point taken by Mr. Garland is one to which we must give effect. The statute and by-law made under it contemplate that the person carrying coal in a cart for sale by retail shall have with him in the cart sufficient means to enable an inspector to check the weight of any bag of coal that he may select from the contents of the cart, and to check it with as little trouble as possible. For that purpose the cart ought to contain sufficient weights to enable any bag to be weighed in a single operation. Here it could only be done in two, either by taking the coal out of the bag and weighing it in two parts, or by first weighing a half-hundredweight bag and using that as another weight. I was at first inclined to think that the latter alternative might be sufficient; but I think

(1) April 26, 1895.

HOUGHTON *v.* ANDREWS

(Unreported).

Before Day and Wright JJ.

Case stated by justices of Surrey.

The respondent was summoned for breach of a by-law, made under s. 28 of the Weights and Measures Act, 1889, which provided that "The person in charge of every vehicle carrying coal for sale or delivery to a purchaser shall carry therewith a weighing instrument of a form approved by the county council, together with correct weights or counterpoises of the denomination of a Board of Trade standard." The respondent on November 16, 1894, was delivering to a purchaser one ton of coal in twenty sacks supposed to contain one hundredweight each. He had in his cart a correct weighing instrument and two half-hundredweight weights. The appellant contended that the respondent should have had some smaller weights to counterbalance the weight of the sack itself. There was a conflict of evidence as to whether it was customary to carry such smaller weights. The justices refused to convict.

THE COURT (Day and Wright JJ.) held that the by-law had been infringed, and allowed the appeal.

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that Mr. Garland's answer to my suggestion was a sound one. The justices ought to have convicted, and the case must therefore, go back.

KENNEDY and RIDLEY JJ. concurred.

Judgment for the appellant.

Solicitors for appellant: *Reed & Co., Bridgwater.*

J. F. C.

C. A.

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Jan. 23.

[IN THE COURT OF APPEAL.]

BARRATT *v.* KEARNS.

Defamation—Privilege—Absolute Privilege—Beneficed Clergyman—Inadequate performance of Duties—Inquiry—Commission issued by Bishop—Witness—Action in respect of Evidence given—Pluralities Act, 1838 (1 & 2 *Vict. c.* 106), *s.* 77—*Pluralities Acts Amendment Act*, 1885 (48 & 49 *Vict. c.* 54), *s.* 3.

A commission, issued by the bishop of a diocese under the Pluralities Act, 1838, and the Pluralities Acts Amendment Act, 1885, to inquire into the inadequate performance of the ecclesiastical duties of any benefice, creates a judicial tribunal, and the occasion on which a witness gives evidence before the commissioners is absolutely privileged, and no action is maintainable in respect of evidence so given.

APPEAL from an order of a judge at chambers directing that the defendant should give further and better answers to certain interrogatories administered by the plaintiff.

The action was brought in respect of slanders alleged to have been spoken on two separate occasions. The plaintiff was the vicar of a parish in the diocese of Winchester, and the defendant was a resident in the parish. The first slander complained of was alleged, in paragraph 3 of the statement of claim, to have been spoken, at a vestry meeting of the parish, concerning the plaintiff in the way of his profession as a clerk in holy orders and of his office as vicar, and to have consisted of certain words that were set out. In his defence the defendant denied that he spoke the words, and he pleaded in the alternative that if he spoke the words set out (which he denied) he did so without malice, and honestly believing the

same to be true, and on a privileged occasion. He further pleaded that if he spoke the words or any of them (which he denied) he did so upon the invitation of the plaintiff.

The first interrogatory related to this alleged slander, and required the defendant to say whether he spoke the words set out, or words to the same effect, in the presence of the churchwardens and others. In answer to this interrogatory the defendant denied that he spoke the words set out, and he set out at length the words that he alleged he spoke on the occasion referred to.

The fourth interrogatory related to the same matter, and was as follows: "How and when do you say that the plaintiff invited you to speak the words set out in paragraph 3 of the statement of claim? If you allege that such invitation was in writing, identify the document or documents." To this interrogatory the defendant answered: "I say that as the words set out in paragraph 3 of the statement of claim are not the words I spoke, I am not called upon to answer this interrogatory."

The second slander was alleged to have been spoken during the course of an inquiry, which was not open to the public, held before a private ecclesiastical commission appointed by the Bishop of Winchester, and to have been spoken and published, in the hearing of the commissioners and others, concerning the plaintiff in the way of his profession of clerk in holy orders and vicar of the parish, and the words complained of were set out at length in paragraph 4 of the statement of claim. The defendant pleaded that if he spoke the words set out in the statement of claim (which he denied) he did so as a witness upon a judicial inquiry under an ecclesiastical commission duly appointed by the Bishop of Winchester, within whose diocese the parish was. That the commission was appointed at the request of the plaintiff to inquire as to his conduct, and that the defendant would contend that no action would lie against him in respect of any evidence given by him as a witness before the commission. He further pleaded that if he spoke the words he did so upon a privileged occasion.

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The second interrogatory related to this matter, and required the defendant to say whether he spoke the words set out, or words to the same effect, in the course of a private ecclesiastical commission appointed by the Bishop of Winchester and before a number of persons. To this interrogatory the defendant replied that he objected to answer it on the grounds set out in his statement of defence, and that he was advised and believed that any evidence given by him upon the inquiry was inadmissible in this action, and that no action could be maintained against him in respect of any evidence given by him at the inquiry.

On the application of the plaintiff, Jelf J. made an order that the defendant should give further answers to the second and fourth interrogatories.

The defendant appealed.

Hohler, for the defendant. As to the words said to have been spoken at the vestry meeting, the defendant denies that he spoke the words set out in the statement of claim, and he cannot be called on to answer questions as to words that he never uttered.

As to the interrogatory founded on the evidence given by the defendant on the commission of inquiry, the defendant cannot be called on to answer it. The inquiry was a judicial one before a tribunal constituted under the statutory powers given by the Pluralities Act, 1838, and the amending Act of 1885. If so, an absolute privilege attached to the occasion on which the evidence of the defendant was given: *Dawkins* v. *Lord Rokeby*. (1) It appears that though the statute of 1885 directs in s. 7 that the witnesses are to be examined on oath, that was not done; but it cannot be that the immunity of a witness from an action against him is affected by the defective procedure of the Court in this respect. No other defect in the constitution of the Court or in the procedure has been alleged. [He referred to *Bonaker* v. *Evans* (2); *Bartlett* v. *Kirwood*. (3)]

(1) (1873) L. R. 8 Q. B. 255; (1875) L. R. 7 H. L. 744.

(2) (1850) 16 Q. B. 162.

(3) (1853) 2 E. & B. 771.

Hugh Fraser, for the plaintiff. Upon the materials before the Court this appears to have been simply a private inquiry to inform the bishop. To such an inquiry no more privilege could attach than to the investigations of a single person sent to interview the parishioners. The evidence of the witnesses was not taken on oath, as it is bound to be on an inquiry under the Pluralities Acts. Further, it has not been shewn that the commissioners were those designated in the later Act. Even if the commissioners had been those contemplated by the Act they ought to be treated, not as a judicial tribunal, but merely as an advisory body. To their meetings only ordinary and not absolute privilege would attach: *Royal Aquarium Society* v. *Parkinson* (1); and if so, the defendant cannot refuse to answer interrogatories as to the evidence that he gave. As to the interrogatory arising on the incident at the vestry meeting, the defendant's absolute denial does not relieve him from the obligation to answer an interrogatory arising on his qualified denial.

COLLINS M.R. This is an appeal from an order of Jelf J. at chambers that the defendant should give further and better answers to two of the interrogatories delivered by the plaintiff. The action is one of slander, and the considerations applicable to the two interrogatories are different. The objection of the defendant to answer in one case arises in this way. In paragraph 3 of the statement of claim certain words are set out which are averred to be the words spoken by the defendant at a vestry meeting. The defendant's answer is twofold: he denies that he spoke the words attributed to him, and he then goes on to say that if he spoke the words set out in the statement of claim he did so honestly and without malice, and at the invitation of the plaintiff. The interrogatory applying to that state of the pleadings is this: "How and when do you say that the plaintiff invited you to speak the words set out in paragraph 3 of the statement of claim?" To this the defendant has answered that as the words complained of were not the words that he spoke, he cannot be called upon to answer the

(1) [1892] 1 Q. B. 431.

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interrogatory. It appears to me that the defences—that he did not speak the words attributed to him, and that if he did it was on the invitation of the plaintiff—are separate defences; and if so the latter is subject to interrogatories, and the defendant cannot escape answering them because of another defence which he has raised. The order of the learned judge on this point must therefore be supported.

The second and more important matter arises upon an interrogatory which requires the defendant to say whether he spoke words alleged in the statement of claim to have been spoken at an inquiry before a private ecclesiastical commission appointed by the Bishop of Winchester. That interrogatory the defendant objects to answer, and he refers to a paragraph in his statement of defence in which he stated that if he spoke the words or any of them set out in paragraph 4 of the statement of claim, he did so as a witness at a judicial inquiry held at the request of the plaintiff by commissioners appointed by the Bishop of Winchester. The ground of his objection, broadly stated, is that the words complained of (if spoken) were so on an occasion to which absolute privilege attached, which had the effect of conferring upon him immunity from action, as being statements made in the course of a judicial inquiry. The question, therefore, is whether the occasion on which the words were spoken can be properly described as a judicial inquiry. The occasion was an inquiry instituted by the Bishop of Winchester in accordance with the provisions contained in certain statutes. The facts that gave rise to the inquiry were that the plaintiff had become insolvent, and his benefice had been sequestered and had so remained for more than six months. The statute applying to such an inquiry is the Pluralities Act, 1838, as altered and enlarged by the amending Act of 1885. The combined effect of s. 77 of the former Act and s. 3 of the latter Act is that whenever the bishop sees reason to believe that the ecclesiastical duties of any benefice are inadequately performed, he may issue a commission to four commissioners, one of whom is to be the archdeacon or rural dean of the archdeaconry or rural deanery wherein the benefice is situated, another a canon residentiary,

prebendary, or honorary canon of the cathedral church of the diocese wherein the benefice is situated, another a beneficed clergyman of the archdeaconry wherein the benefice is situated, and the fourth a layman on the commission of the peace for the county, and the incumbent may add another commissioner —either an incumbent or a magistrate. The commission issued by the bishop, a copy of which is before the Court, is addressed to five persons, who agree with the description of persons to whom, under the statute, a commission may be issued. It recites that the benefice is under sequestration, and that by virtue of the Sequestration Act, 1871, if a sequestration issues and remains in force for a period of six months, the bishop is required after that period and as long as the sequestration remains in force to take order for the due performance of the services of the church of the benefice, with power to appoint a curate or curates with such stipend as the bishop thinks fit. It continues, following the words of s. 5 of the Act, that in case the sequestration continues in force for more than six months, the bishop, if it appears that scandal or inconvenience is likely to arise from the incumbent continuing to perform the services of the church while the sequestration remains in force, may inhibit the incumbent from performing any services of the church so long as the sequestration remains in force, and may at any time withdraw such inhibition. It recites that the bishop had been informed that the ecclesiastical duties of the plaintiff's benefice had been inadequately performed by him, and that scandal and inconvenience might be likely to arise if he were permitted to continue to perform the services of the church. It recites that notice had been given to the plaintiff of the bishop's intention to issue a commission of inquiry, and it directs the five persons first named and described to inquire into the facts of the case (first giving the plaintiff notice of the commission and of the place of meeting), and it further directs the commissioners, or the major part of them, to report to the bishop in writing whether the duties of the benefice had been inadequately performed, and whether, in their opinion, scandal or inconvenience would be likely to arise from the plaintiff continuing to perform the services of the

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church, and to transmit to the bishop with their report the commission and the evidence or statements taken by the commissioners. It seems to me that this commission was distinctly constituted by the bishop under the powers conferred on him by the Acts of 1838 and 1885, and that it created a judicial tribunal which under the provisions of s. 6 of the later Act had power to compel the attendance of witnesses, and the production of such documents, evidences, and writings as might be necessary. The point taken on behalf of the plaintiff is that it has not been made clear that all the conditions contained in the statutes in relation to the constitution of the commission have been performed. In my opinion this is a case to which the principle "Omnia presumuntur rite esse acta" is applicable. We find a commission conforming on the face of it with the statutory provisions applicable to such a commission, and it is for the person who raises an objection to the constitution of the commission to support his objection by evidence, and that has not been done. If this is so, the conclusion at which we must arrive on the evidence before us is that the commission was properly constituted under the authority of the statutes. In *Royal Aquarium Society* v. *Parkinson* (1) Lord Esher M.R. states the law thus: "It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins* v. *Lord Rokeby* (2) the doctrine was extended to a military Court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it." That description applies to the present case, which is that of an

(1) [1892] 1 Q.B. 431, at p. 442. (2) L.R. 8 Q.B. 255; L.R. 7 H.L. 744.

ecclesiastical inquiry authorized by statute, before commissioners whose duty it was to hear evidence and to report on the matter referred to them. In respect of the statements made by a witness in the course of these proceedings there is an absolute immunity from liability to an action, and consequently the defendant cannot be interrogated as to the evidence that he gave. The order of the judge as to the interrogatory directed to that evidence cannot be supported, and to that extent the appeal must be allowed.

COZENS-HARDY L.J. I am of the same opinion. I think it is clear that the tribunal before which the defendant gave evidence was a statutory body brought into existence by the combined operation of the Pluralities Act, 1838, and the amending Act of 1885. That conclusion I draw from the commission itself and from a comparison of the terms of the commission with the language of the Acts. It is not necessary, however, to rely solely on that, because the parties have agreed that all available materials for our decision shall be before the Court, and we have produced to us a letter of the bishop, and a letter of the plaintiff, referring distinctly to the issue of the commission under the Act of 1885. That being so, we are bound to treat the tribunal constituted by the commission as a statutory body, and the presumption, in the absence of evidence to the contrary, is that everything was done in the constitution of the tribunal which ought to have been done. If then this was a legal tribunal, the authority of the decision in *Dawkins* v. *Lord Rokeby* (1) satisfies me that the occasion on which evidence is given by the witnesses before such a tribunal is absolutely privileged. One point only in the proceedings remains to be noticed. The evidence before the commissioners was not given upon oath, but the same remark is applicable to the evidence given which led to the action of *Dawkins* v. *Lord Rokeby*. (1) In this case I certainly think that the commissioners were in error in not taking the evidence upon oath; but that is not a mistake which vitiates the whole proceedings, or alters the character of the tribunal. I agree,

(1) L. R. 8 Q. B. 255; L. R. 7 H. L. 744.

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therefore, that the appeal should be allowed so far as the answer to the second interrogatory is concerned.

Appeal allowed in part.

Solicitors for plaintiff: *Richards & Barnett.*

Solicitor for defendant: *F. J. Abbott, for F. J. Bell, Kingston-upon-Thames.*

A. M.

C. A. 1904 *Aug.* 11.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* HUNT.

Practice — Stay of Proceedings — Foreclosure Action — Action in Chancery Division — Concurrent Action in King's Bench Division — Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5.

As a mortgagee who brings an action in the Chancery Division for an account of principal and interest due under the mortgage has a complete remedy by claiming in that action a personal order for payment, a second action brought in the King's Bench Division, while the Chancery action is pending, to recover principal and interest, is improper, and should be stayed.

Poulett v. *Hill*, [1893] 1 Ch. 277, followed.

APPLICATION for a stay of execution pending an appeal from an order of a judge at chambers.

The facts of the case were that the defendant was lessee of certain premises which he mortgaged by deed of March 28, 1901, to the plaintiff as security for a loan of 400*l.* The mortgage deed contained a provision for the repayment of the principal by quarterly instalments. In May, 1904, an action was commenced by writ issued in the Chancery Division by the plaintiff as mortgagee, in which she claimed—(1.) an account of all sums due by the defendant to the plaintiff under the mortgage deed; (2.) payment of the sum found to be due; (3.) in default, sale or foreclosure. The defence raised in that action was in effect that nine of the instalments covenanted to be paid had been paid to the authorized agent of the plaintiff, and the defendant alleged that the only question to be tried in

the action was whether the person to whom the instalments were paid had received them as the agent of the plaintiff. The defendant further alleged that there was no necessity for the taking of an account, and that he was ready and willing to pay the amount actually due so soon as the question of agency should have been determined.

Notice of trial was given, but before the case was heard the plaintiff issued a specially indorsed writ in the King's Bench Division by which she claimed 416*l.* 17*s.* 2*d.* for principal and interest under the covenant in the mortgage deed, and a summons for judgment under Order XIV. was taken out. A summons was thereupon taken out on behalf of the defendant, asking for a stay of the proceedings in the King's Bench Division, on the ground that the whole cause of action was the subject of the action pending in the Chancery Division. The matter came before a master, who made an order on the plaintiff's summons, giving the defendant unconditional leave to defend, and on the defendant's summons he granted a stay. From this order the plaintiff appealed, and it was varied by Phillimore J. by the removal of the stay and by granting leave to the defendant only on condition of his paying into court the sum of 167*l.* 3*s.* 9*d.*, the amount that would be due to the plaintiff in any event. The defendant thereupon applied to the Court of Appeal for a stay of execution pending an appeal from the order of the learned judge.

M. Lush, K.C., and *Lewis Thomas*, for the defendant. The order of the master staying the action was right and should be restored. The plaintiff can obtain, either under the present pleadings in the Chancery action or, at all events, by an amendment of them, all the relief to which she is entitled; and the second action is therefore oppressive. The decision in *Poulett* v. *Hill* (1) is conclusive on the point.

J. A. Symmons, for the plaintiff. A mortgagee may pursue all his remedies concurrently. If he brings two actions, it is true that one may be stayed; but whether there should be a stay, and if so on what terms, is a matter of discretion for

(1) [1893] 1 Ch. 277.

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the judge. Here the judge at chambers has exercised his discretion by directing payment into court of money admitted to be due, and payment out of a part to the plaintiff. The defendant might have made a payment into court in the Chancery action, and the bringing of the second action is due to his not having done so. The plaintiff was, therefore, entitled to the speedy remedy under Order XIV. True he might have obtained that remedy in the Chancery Division, but that would still have necessitated a second action, because Order XIV. does not apply unless the writ is specially indorsed. *Poulett* v. *Hill* (1) is distinguishable, because in that case the second action was for interest alone, and the judgment in that case proceeds on the necessity of avoiding a series of actions for each six months' interest. In these circumstances the order of the learned judge should be supported. [He referred to *Bourke* v. *Donoghue*. (2)]

COLLINS M.R. I am of opinion that execution must be stayed. It seems clear to me that this is an attempt to defeat what the Court of Appeal held to be the law in *Poulett* v. *Hill*. (1)

Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is a complete remedy in the Court in which the suit was first started. In this case personal payment was not asked for in the writ in the Chancery action, and that appears to have been done because the plaintiff desired to put in operation the remedy under Order XIV. and have recourse to two separate proceedings, in the first of which she might have got all the relief to which she is entitled. That she could have done so is abundantly clear, as appears from the judgment of Lindley L.J. in *Poulett* v. *Hill*. (1) He says: "Before the Judicature Acts a personal order for pay-

(1) [1893] 1 Ch. 277. (2) (1887) 20 L. R. Ir. 324.

ment could only be obtained by bringing a common law action, in which interest could only be recovered down to the date of the writ, and a personal order for payment of the subsequent interest could only be obtained by a fresh action; but now that a personal order can be obtained for payment of what is found due on taking the account, such second action is unnecessary. In *Farrer* v. *Lacy, Hartland & Co.* (1) the form of judgment is given which was settled by the Court of Appeal. Whether this particular point was present to the mind of the Court is not quite clear; but a general form was settled giving a personal order for payment of what was found due for principal and interest on taking an account, so that the necessity for a subsequent action for interest is taken away. The plaintiffs then could in the first action have obtained a personal order for payment of all that was due to them for principal and interest, and the present action is unnecessary. If we were to affirm the order under appeal our decision would lead to bringing improper and vexatious actions." In my opinion, therefore, this application must be allowed.

STIRLING L.J. I am of the same opinion. *Poulett* v. *Hill* (2) binds us, and passages from the judgment in that case read by my Lord amply justify the application to stay, and go to shew that the bringing of this second action was improper.

Application allowed. (3)

Solicitor for plaintiff: *W. C. Pannell.*

Solicitors for defendant: *Barraud & Jupp.*

(1) (1885) 31 Ch. D. 42.

(2) [1893] 1 Ch. 277.

(3) The appeal was not proceeded with, the plaintiff amending the writ in the Chancery action by the addition of a claim for an order for personal payment.

A. M.

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Dec. 5, 16.

BLUNDELL *v.* THE KING.

Defence Acts—Lands taken Compulsorily—Compensation—Injurious Affection of adjoining Lands—Land taken for Fort—Defence Act, 1842 (5 & 6 *Vict. c.* 94), *s.* 19—*Ranges Act*, 1891 (54 & 55 *Vict. c.* 54), *s.* 11.

Where lands are compulsorily taken under the Defence Acts for the erection of a fort, the owner is entitled to compensation for the injurious affection of his adjoining lands arising from the natural and ordinary use of the lands taken for the purpose of a fort and the firing of guns placed therein.

Reg. v. *Abbott*, [1897] 2 I. R. 362, and *In re Ned's Point Battery*, [1903] 2 I. R. 192, approved and followed.

PETITION OF RIGHT, tried by Ridley J. without a jury.

From the pleadings it appeared that the suppliant was the tenant for life in possession of an estate in the county of Lancaster comprising (inter alia) so much of the foreshores of the Mersey and Crosby Channel as abutted on the western side of the estate. In the year 1902 the Secretary of State for War notified to the suppliant his desire to purchase absolutely certain portions of the estate for the purposes and under the powers of the Defence Acts, 1842 to 1873, the Ordnance Board Transfer Act, 1855, and the Ranges Act, 1891, s. 11, and it was agreed that the compensation to be paid to the suppliant under those enactments for the portions of his estate so required should be settled by arbitration as if the said portions of the estate had been surveyed and marked out under s. 16 of the Defence Act, 1842 (5 & 6 Vict. c. 94), and the necessity for taking the same had been certified and the taking thereof had been authorized as mentioned in s. 23 of that Act, and that the amount awarded should bear interest. A notice to treat was duly served on the suppliant under s. 19 of the Defence Act, 1842, in which it was stated (inter alia) that the Secretary of State required to purchase absolutely the said portions of the suppliant's estate and requiring, pursuant to s. 11 of the Ranges Act, 1891 (54 & 55 Vict. c. 54), that in the event of the compensation not being agreed within fourteen days it should be settled by arbitration and not by reference to a jury.

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The suppliant's claim in respect of the lands to be taken comprised (*a*) compensation representing the value of the lands to be taken, and (*b*) compensation for damage for severance from, and depreciation and injurious affection of, the lands of the suppliant adjoining the lands to be taken. The amount of compensation not having been agreed to, an arbitrator was appointed in writing by the parties for the purpose of determining it.

At the arbitration evidence was given on behalf of the suppliant that his adjoining lands would be injuriously affected by the exercise of the powers under the said Acts, and during the hearing it was agreed that the arbitrator should assess separately (*a*) the compensation payable in respect of the value of the lands to be taken, and (*b*) the compensation for the damage to be sustained by the suppliant by reason of his adjoining lands being injuriously affected. On August 13, 1903, the arbitrator duly made his award, whereby he awarded (*a*) that the amount of compensation to be paid for the value of the lands to be taken apart from the injurious affection of the suppliant's adjoining lands (therein denominated by him the "absolute purchase" of the said lands) was the sum of 12,642*l.*, and (*b*) that the amount of the compensation to be paid for the damage to be sustained by the suppliant by reason of the other lands belonging to him and adjoining thereto being injuriously affected by the exercise of the powers of the said Acts was the sum of 5000*l.* The suppliant prayed that the two sums of 12,642*l.* and 5000*l.*, with interest from the date of the award, might be paid to him.

The answer of the Crown admitted that the sum of 12,642*l.* and interest thereon was payable to the suppliant in respect of the absolute purchase of the lands taken. As to the sum of 5000*l.*, the Attorney-General informed the Court in the answer and plea that it was awarded for the injurious affection of certain other lands of the suppliant adjoining the lands taken by reason of the lands taken being intended for the erection of a fort and the firing of guns to be placed therein, and submitted that compensation for such injurious affection was not payable where lands were taken under the Defence Acts, 1842

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to 1873, for the defence of the realm, and denied that the sum of 5000*l.* or any part thereof was payable to the suppliant.

Freeman, K.C., and *William Wills*, for the suppliant. The suppliant is entitled, under s. 19 of the Defence Act, 1842, to compensation in respect of the injurious affection of his adjoining lands. There can be no reason why the word "compensation" as used in the Defence Acts should have any other meaning than it has in the Lands Clauses Act, 1845, that is, an indemnity or satisfaction to the person whose land is taken, and not merely the bare value of the land: the restricted meaning which the Crown seeks to place upon the word would work serious injustice to persons whose land was compulsorily taken for purposes of national defence. There can be no reason for excluding the element of injurious affection of adjoining land where land is taken under compulsory powers, for, if the land were taken and the compensation arrived at by agreement, an allowance for injurious affection would certainly be included in the amount: *Duke of Buccleuch* v. *Metropolitan Board of Works*. (1) In many Acts empowering the Crown to acquire land compulsorily, such as the Ranges Act, 1891, and the Military Lands Act, 1892, the Lands Clauses Acts are incorporated, and the Lands Clauses Act, 1860, gives to the Secretary of State for War the powers of promoters under the Lands Clauses Act, 1845; and it cannot be supposed that the Legislature intended a different principle to the ordinary one to apply to the assessment of compensation under the Defence Acts. Damage by reason of severence was, in the opinion of Pollock C.B., properly included in the "compensation" payable under the Defence Acts: *In re Laws* (2); and the exact point raised in the present case has been decided in favour of the suppliant's contention in two Irish cases, *Reg.* v. *Abbott* (3) and *In re Ned's Point Battery* (4), which decisions should be followed.

Sir R. B. Finlay, A.-G., and *H. Sutton*, for the Crown. The suppliant is not entitled to damage for injurious affection

(1) (1870) L. R. 5 Ex. 221, at p. 254.
(2) (1847) 1 Ex. 441.
(3) [1897] 2 I. R. 362.
(4) [1903] 2 I. R. 192.

of his adjoining lands. There is no provision in s. 19 of the Defence Act, 1842, for compensation for damage done such as there is in s. 63 of the Lands Clauses Act, 1845, and the difference of language in the two enactments raises a strong presumption that the measure of compensation is different under the two statutes. A probable explanation of this difference is that the Legislature was influenced by the fact that land taken under the Defence Acts was required for purposes of urgent public importance. A similar distinction may be observed in 33 Geo. 2, c. 11, s. 5, as contrasted with 3 Geo. 4, c. 126, s. 83. The view expressed by Pollock C.B. in *In re Laws* (1) was unnecessary to the decision of that case, and the two Irish decisions are not binding on this Court, and should not be followed.

Freeman, K.C., in reply.

Cur. adv. vult.

1904. Dec. 16. The following written judgment was delivered by

RIDLEY J. This was a petition of right in which the suppliant, Mr. Blundell, was tenant for life of an estate in the parish of Crosby, Lancashire, a portion of which had been purchased by the Secretary of State for War under the powers given by the Defence Acts, 1842 to 1873, the Ordnance Board Transfer Act, 1855, and the Ranges Act, 1891. The compensation to be paid for the portion so required by the Secretary of State was settled by arbitration; and on August 13, 1903, the arbitrator made his award, by which he found that the amount of compensation to be paid for the absolute purchase of the land taken was 12,642*l.*, and that the amount of compensation for damage to be sustained by the suppliant by reason of other adjoining lands belonging to him being injuriously affected by the exercise of the powers of the said Acts was 5000*l.* No question was raised as to the amount so awarded for the purchase of the land; but it was contended as to the sum awarded for injurious affection of other adjoining lands that this was not payable when land is taken under the

(1) 1 Ex. 441.

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Acts passed for the defence of the realm, although it would be payable if the land had been taken under the Lands Clauses Act, 1845, and this sum would then have been properly awarded under that Act.

By the 19th section of 5 & 6 Vict. c. 94 (being the Defence Act, 1842), provision is made for the case where parties do not agree on the sum of money offered as the consideration for the absolute purchase of the lands required, or on the annual rent or sum offered for the hire thereof; and it is enacted that in such case a jury is "to find the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments or for the possession or use thereof as the case may be." There are in the same Act sections which deal with the proportion to be paid out of the compensation paid for the lands to any persons having an interest as lessees or tenants at will in the lands, and for the investment of the purchase-money by order of the Barons of the Court of Exchequer on behalf of any persons interested. The statute 23 & 24 Vict. c. 112 (1860) was also referred to on behalf of the suppliant, but I do not think that its provisions are of any assistance on the point now in question.

By the Ranges Act, 1891 (54 & 55 Vict. c. 54, s. 11), it is provided that, "where any land is acquired either under the Defence Act, 1842, and the Acts amending the same, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority acquiring the land may require that the compensation to be paid for the land be settled by arbitration and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration shall, if not already applicable, apply for the purpose of settling the compensation." I think that these words do not, when properly considered, mean more than this—that the provisions for the notices, appointment of arbitrators, costs, delivery of award, and so forth, which are contained in the Lands Clauses Act relating to arbitration shall have application to proceedings under the Defence Acts; and, indeed, it was scarcely argued that they have a signification large enough to extend the meaning of the words of the

19th section of the Defence Act, 1842. It should be mentioned that there had been a similar provision in the 4th section of the Barracks Act, 1890 (53 & 54 Vict. c. 25); but by the section just read from the Ranges Act, 1891, that section was repealed. The Lands Clauses Acts Amendment Act of 1860 (23 & 24 Vict. c. 106) also gives, by s. 7, to the Secretary for War the right to use powers given to promoters of undertakings by the Lands Clauses Act of 1845, but this section also must have a similar interpretation.

There being, therefore, no statute aiding the words which have to be considered, the question is whether they do include, not only purchase-money of the lands taken, but injurious affection of other adjoining lands of the same proprietor. It was contended for the Crown that the Legislature has purposely made a difference between the compensation to be awarded under the Lands Clauses Act, 1845, and that to be awarded under the Defence Acts, and that the former includes, while the latter does not include, damages for injurious affection, because in the former case the undertaking by and for which the land is taken, although for the benefit of the public, yet is not of so great public importance as the defence of the country; and the Attorney-General was able to point to some enactments such as the 33 Geo. 2, c. 11, which, in dealing with the acquisition of land for a gunpowder magazine at Purfleet empowers Commissioners to treat for the absolute purchase of the land, and is silent as to injurious affection; whereas, on the other hand, in the 3 Geo. 4, c. 126, which deals with the widening and improving of turnpike roads, the trustees are to purchase lands for that purpose and to treat and agree, not only for the purchase of the same, but also for the loss or damage that the owners may sustain. It might, indeed, be that a person whose lands were taken from him for the purpose of national defence should be awarded compensation on a lower scale and on a different basis than that allowed to persons whose land is taken for the encouragement and development of traffic, industry, and commerce. Yet I think that the distinction should be supported by some indication more precise than is to be found in the mere difference between

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these two examples of statutes. They were passed before the subject of compensation had been dealt with by the Lands Clauses Act and at periods when it was comparatively bare of legal decision, and when the difference between them is less likely to have been intentional.

It was further put that the Defence Act, 1842, was passed before the Lands Clauses Act, 1845, but that since that time there have been several statutes passed relating to national defence by which the Lands Clauses Act might have been incorporated with the Defence Act, but was not. That is quite true, and it is an argument of some importance. Some reliance was also placed on the sections which provide for apportionment of the compensation and for investment of the same. But, if compensation is to include a sum recovered for injurious affection, I do not quite see why that sum should not be dealt with along with the purchase-money. But the real question seems to be whether, notwithstanding the absence of a section similar to s. 63 of the Lands Clauses Act, 1845, the words of s. 19 do or do not include damages as well as a mere purchase price.

On the other side it was argued that "compensation" means an indemnity—a full satisfaction for the land taken, and that, if in the taking of that land other land is injuriously affected, that injurious affection must be included in the term. If such a claim were decided by agreement, I think there is no doubt that no person would agree on the compensation due for his land to be taken without also adding to the actual purchase-money a claim in respect of the damages done by injurious affection of other land belonging to him; and it is fairly argued that the same elements must be included when a jury or an arbitrator has to assess the compensation. It is also to be remarked that s. 63 of the Lands Clauses Act does, in fact, treat such injurious affection as a part of the compensation to be given, for it enacts that "in assessing such compensation 'regard is to be had' not only to the value of the land but also to the damage," &c. And in the same section "compensation" is apparently used as equivalent to "purchase-money"—so that the damages to be given for injurious affection are treated

as a matter to be included in the purchase-money. I am inclined myself to prefer this reasoning, although I am somewhat pressed with the consequence which seems to follow, that even without s. 63 compensation under the Lands Clauses Act, 1845, would have included damages for injurious affection.

The matter, however, was dealt with by the Queen's Bench Division in Ireland in two cases. First in *Reg.* v. *Abbott* (1): there lands were taken under the Defence Acts, and an arbitration was held before the defendant, who was an arbitrator appointed under the provisions of the Railways (Ireland) Act, 1851. The arbitrator held he had no jurisdiction to award compensation except for the actual taking of the lands, and the question was brought before the Court on a mandamus to compel him to do so. It was held both by the Queen's Bench Division and the Court of Appeal that the arbitrator was not properly appointed, and therefore the proceedings were coram non judice; but in the Court of first instance it was held by all the judges that the claimant was properly entitled to claim damages for injurious affection beyond the mere purchase-money. O'Brien J., in particular, discusses the subject at length, and comes to the conclusion that compensation ought to be held to be of the same kind under the two Acts, and that the section of the Lands Clauses Act, 1845, is to be taken rather as a legislative exposition of what was meant by compensation, and not as granting a new right. In the Court of Appeal it was held that the arbitrator was not properly appointed, and it was unnecessary to decide the present point; but Walker L.J. said: "What evidence, as to compensation, a legally constituted tribunal should receive is not before us; but it has been carefully considered by the judges of the Queen's Bench Division, and I do not desire to be understood as holding out any hope that any considered conclusion of mine would be different from theirs." The other case is *In re Ned's Point Battery* (2); and in that case the Court of King's Bench Division followed and adopted the same view. The Attorney-General contended that I was not bound by these decisions—but they are entitled to the greatest

(1) [1897] 2 I. R. 362. (2) [1903] 2 I. R. 192.

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respect; and, so far from dissenting from them, I am inclined to take the same view. The judgment must, therefore, be for the suppliant with costs.

Judgment for the suppliant.

Solicitors for suppliant: *Guscotte, Wadham, Bradbury & Tickell.*

Solicitor for the Crown: *Solicitor to the Treasury.*

W. J. B.

C. A.

1905

Jan. 19, 20.

[IN THE COURT OF APPEAL.]

FITCH *v.* BERMONDSEY GUARDIANS.

Lunacy—Maintenance — Pauper — Asylum—Pauper Lunatic settled outside Asylum Area—Expenses of Maintenance—Limit of Charge—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 283, *sub-s.* 3.

The visiting committee of a lunatic asylum are not entitled, under s. 283 of the Lunacy Act, 1890, to fix a greater weekly sum than 14*s.* to be charged for the expenses of the lodging and maintenance of pauper lunatics in the asylum, even in the case of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs.

Decision of Divisional Court, [1904] 2 K. B. 709, affirmed.

APPEAL from a decision of the Divisional Court (1) affirming a decision of the judge of the City of London Court.

The action was brought in the City of London Court by the visiting committee of the City of London Lunatic Asylum, in the name of their clerk, to recover from the guardians of the poor of the parish of Bermondsey the sum of 11*l.* 15*s.* for the lodging and maintenance in the asylum from December 30, 1903, to March 30, 1904 of one Andrew John Aiton, a pauper lunatic whose legal settlement was in Bermondsey, in the county of London.

Previously to February 1904, the visiting committee had by resolution under s. 283, sub-s. 1, of the Lunacy Act, 1890 (2),

(1) [1904] 2 K. B. 709.

(2) By s. 283 of the Lunacy Act, 1890, "(1.) Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of

fixed the weekly charge for the maintenance and other expenses in the asylum of pauper lunatics chargeable to the union of the City of London at 12*s.* 3*d.* By a resolution of February 4, 1904, under sub-s. 3 of s. 283, the committee raised the weekly charge for the maintenance and expenses in the asylum of pauper lunatics chargeable to unions outside the City to 21*s.*, and notice of that resolution was thereupon communicated to the defendants. The sum of 11*l.* 15*s.*, to which the action related, represented forty-five days' lodging and maintenance at 2*s.* per day from January 1 to February 15, and forty-five days at 3*s.* per day from February 15 to March 30. The defendants paid 9*l.* into court, being 2*s.* per day for the whole period; and the action proceeded for the balance. The county court judge gave judgment for the defendants, and his decision was affirmed by the Divisional Court.

The plaintiffs appealed.

Danckwerts, K.C., and *Neilson*, for the plaintiffs. By s. 54 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), the visiting committee were required to fix a weekly charge for the maintenance of every pauper lunatic confined in the asylum sufficient to defray all the expenses incidental to the care of the lunatic and to pay the salaries of the staff, and they were empowered to alter the amount as occasion required. They were further empowered to fix a greater weekly sum for out-union lunatics than for lunatics belonging to the union, but such excess was not to exceed 14*s.* a week. Sect. 283, sub-ss. 1, 2, and 3, of the Lunacy Act, 1890, which is a consolidating Act, is intended to be in substance a re-enactment of s. 54 of the Act of 1853. Both under the new system and under the old the intention was to raise a building fund to some extent at

each pauper lunatic in the asylum, and of such amount that the total of such weekly sums shall be sufficient to defray such expenses and also the salaries of the officers and attendants of the asylum, and such weekly sum may from time to time be altered."

"(3.) A committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."

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the expense of the out-union patients: see sub-s. 4 of s. 283, re-enacting s. 6 of the Lunacy Act, 1862 (25 & 26 Vict. c. 111). The question is whether sub-s. 3 of s. 283 cannot be read so as to carry out the intention of the Act of 1853; for it cannot be suggested that the Legislature by the Act of 1890 intended to cut down the power to differentiate between out-union patients and home patients to cases under 14*s.* a week. The difficulty has arisen because—possibly by inadvertence—the language has been varied and the order of the provisions in s. 54 has not been preserved in s. 283. Sub-s. 3 is susceptible of two constructions. The "greater weekly sum not exceeding 14*s.*" therein mentioned may be used as covering either the total weekly charge or the excess to be charged for out-union patients over home patients. It is submitted that the latter is the true construction. This being a consolidating Act, the Court will adopt that construction which will preserve the intention of the earlier legislation.

C. A. Russell, K.C., and *R. Cunningham Glen*, for the defendants.

VAUGHAN WILLIAMS L.J. I quite feel the force of Mr. Danckwerts' argument, and I daresay that the difference in the respect that he has been speaking of between the legislation of 1890 and that of 1853 was accidental, and not intended by the draftsman. But we have to read the Act of Parliament as it is drawn, and it appears to me that the words are so strong that we cannot accede to that contention. I think that the decision of the Divisional Court was quite right. I only wish to add that, when I have spoken of a possible slip by those who had to draft the Act of 1890, I do not say that in any contemptuous spirit whatever. Whenever I have to deal with consolidating legislation I am always struck with the enormous difficulties imposed upon the draftsman, and I am thankful that I have not to undertake the work myself.

ROMER L.J. concurred.

STIRLING L.J. I agree. I only wish to say for myself that I am not quite satisfied that the construction of s. 54 of the

Act of 1853 is such as Mr. Danckwerts has contended for. But, assuming that construction to be correct, I think that the reasons given by the Divisional Court are quite satisfactory, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *The City Solicitor; Arkcoll, Cockell & Chadwick.*

H. B. H.

NATHAN *v.* ROUSE AND ANOTHER.

1905 *Jan.* 25.

London—Public Health—Drains—Nuisance—"Acts or Defaults" of two or more Persons—Right to Contribution—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 5, 120.

The defendants' premises were drained through a drain running under the plaintiff's premises, which drain for part of its length carried only the defendants' drainage, and for the rest of its length carried the drainage of both premises. The defendants had a right so to use the drain. A nuisance having arisen on the plaintiff's premises owing to the whole of the drain being defective and permitting sewage to escape, the sanitary authority took proceedings against him, under ss. 4 and 5 of the Public Health (London) Act, 1891, and obtained an order upon him to do the work necessary to abate the nuisance. The plaintiff did the work and abated the nuisance, all the work being done upon his own premises.

Held, that the plaintiff could not recover from the defendants a proportionate part of the costs of abating the nuisance as being one of two or more persons "by whose act or default" the nuisance had been caused, within the meaning of s. 120 of the Public Health (London) Act, 1891.

APPEAL from the county court of Shoreditch.

The plaintiff was the lessee of a house, No. 5, in a street in London, and the defendants were the lessees of the adjoining house, No. 4. A drain from No. 4 ran under No. 5, which drain for the length of twelve feet from the defendants' boundary carried only the sewage from their premises, and thence carried the sewage of the plaintiff's premises as well as that of the defendants' premises. It was admitted that the defendants were entitled to send the sewage of their premises through that drain; and no evidence was given that they were in fact under any obligation to keep it in repair.

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The sanitary authority of the district being satisfied of the existence of a nuisance on No. 5 owing to sewage leaking from the drain, which was defective throughout its whole length, served notice on the plaintiff under s. 4 of the Public Health (London) Act, 1891, requiring him to abate the nuisance and do the work necessary for that purpose; and, the notice not having been complied with, took proceedings against him and obtained an order to abate the nuisance. The plaintiff thereupon did the necessary work, and incurred expenses to the amount of 125*l*. The whole of the work done by the plaintiff was done upon his own premises. A notice had also been served upon the defendants in respect of the drain upon their own premises, and they had done all the necessary work at their own expense.

The plaintiff brought this action to recover from the defendants the sum of 29*l*. under s. 120 of the Public Health (London) Act, 1891 (1), as a proportionate part of the expenses incurred by him in respect of abating the nuisance, which he alleged was partly caused by their act or default.

(1) The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 120: "(1.) Where any nuisance under this Act appears to be wholly or partially caused by the acts or defaults of two or more persons, the sanitary authority or other complainant may institute proceedings against any one of such persons, or may include all or any two or more of them in one proceeding; and any one or more of such persons may be ordered to abate the nuisance, so far as it appears to the Court having cognizance of the case to be caused by his or their acts or defaults, or may be prohibited from continuing any acts or defaults which in the opinion of the Court contribute to the nuisance, or may be fined or otherwise punished, notwithstanding that the acts or defaults of any one of such persons would not separately have caused a nuisance; and the costs may be distributed as to the Court may appear fair and reasonable."

"(3.) Where some only of the persons by whose act or default any nuisance has been caused have been proceeded against under this Act, they shall, without prejudice to any other remedy, be entitled to recover in a summary manner from the other persons who were not proceeded against a proportionate part of the costs of and incidental to such proceedings and abating such nuisance, and of any fine and costs ordered to be paid by the Court in such proceedings."

Sect. 117: "(2.) Proceedings for the recovery of a demand not exceeding 50*l*., which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the county court as if such demand were a debt."

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The county court judge, as appeared from his note, gave his decision as follows: "I find that the whole of the money now sought to be recovered was for work done on No. 5. I have had no evidence to shew that defendants were liable to repair or make good the drains running from house No. 4 under No. 5. It therefore seems to me that the plaintiff, the owner of No. 5, was the person by whose act or default these drains allowed sewage to escape, and hence nuisance not caused by any act or default of defendants." The county court judge, therefore, gave judgment for the defendants, and the plaintiff appealed.

Macmorran, K.C., and *Watson Moyses*, for the plaintiff. The defendants were persons by whose act or default this nuisance was wholly or partially caused, within s. 120 of the Public Health (London) Act, 1891. They had a right or easement to send their sewage through the drain on the plaintiff's premises, and a duty was imposed upon them to see that their sewage did not cause a nuisance upon his premises. The nuisance was caused by the leakage of sewage from the drain along its whole length, and part of that sewage came from the defendants' premises. The nuisance, therefore, was partly caused by their act or default. With regard to the twelve feet of drain which was used solely for their sewage, they permitted it to be out of repair, so that the sewage escaped and thereby caused or partially caused the nuisance on the plaintiff's premises: see *Humphries* v. *Cousins*. (1) The defendants, as owners of the dominant tenement, had a right to enter upon the servient tenement and repair the drain; they did not do so, and owing to the want of repair the sewage which they sent escaped and caused the nuisance. Further, it was owing to their default that the sewage escaped and caused the nuisance, because they owed a duty to the sanitary authority not to permit their sewage to cause a nuisance.

R. Cunningham Glen, for the defendants. This nuisance was not caused by any act or default of the defendants, but solely by the act or default of the plaintiff. Proceedings were taken against the plaintiff under the Act in respect of a nuisance

(1) (1877) 2 C. P. D. 239.

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existing upon his premises, and the magistrate made an order against him as being the person in default. The defendants were not, and could not be, heard in those proceedings. Proceedings could not have been brought against them in respect of the nuisance on the plaintiff's premises; there was no "default" on their part in not repairing the drain. The statutory right to contribution given by s. 120, sub-s. 3, exists only when the nuisance has been caused by the joint acts or defaults of several persons, against all of whom proceedings might have been taken by the sanitary authority, when one only has been proceeded against. Here there was no joint act or default, and the magistrate has decided that the plaintiff alone was in default. A case cannot be brought within s. 120 when all the work necessary to remedy the nuisance can be, and is, done upon the premises of one person: see *Haedicke* v. *Friern Barnet Urban District Council*. (1)

Macmorran, K.C., replied.

LORD ALVERSTONE C.J. There is much to be said in favour of the view urged on behalf of the plaintiff—that, where a nuisance is caused partly by sewage coming from adjoining premises, the Legislature intended by s. 120 to impose upon the persons sending down the sewage a statutory obligation to contribute to the expense of repairing the drain on the premises on which the nuisance exists. That, however, is not, in my opinion, the natural meaning of the section, and I am not prepared to say that the learned county court judge came to a wrong conclusion. For the purposes of this case it must be taken that the defendants had a right to discharge their sewage through this drain. The only evidence before us is that sewage from the defendants' premises passed through a drain upon the plaintiff's premises, and that for twelve feet of that drain the only sewage which passed through it was the sewage from their premises. Now, do those facts enable the plaintiff to recover under s. 120 of the Public Health (London) Act, 1891? The learned county court judge said: "I have had no evidence to shew that defendants were liable

(1) [1905] 1 K. B. 110.

to repair or make good the drains running from house No. 4 under No. 5"; and I think we cannot say as a matter of law that he was wrong in coming to that conclusion, or in taking that circumstance into consideration in dealing with the obligations of a person whose act or default is complained of under s. 120. The learned judge then went on to say: "It therefore seems to me that the plaintiff, the owner of No. 5, was the person by whose act or default these drains allowed sewage to escape, and hence nuisance not caused by any act or default of defendants." It seems to me that, although the defendants may possibly have had a right to go on to the plaintiff's premises and repair this drain, it cannot be said that there was a duty upon them to do so at the instance of the owner or occupier of No. 5 or of the sanitary authority. I know of no statute which would enable the local authority to impose such an obligation upon the defendants, so as to make the defendants persons by whose act or default the nuisance had been caused. In my opinion, the purview and object of s. 120 was something very different. I cannot think that it was passed to meet the case where there is a right to use a drain upon the premises of another, but not necessarily any obligation to repair it. Further, I feel great difficulty in seeing how it is possible to apportion the cost incurred except by reference to the property on which the work is done, and to the obligations of the several persons in respect of that property. Here all the work was done upon the plaintiff's premises, and there seems to be no possible method of apportioning the cost simply because more or less sewage might come from the defendants' premises. That seems to me to shew that the section deals with apportionment between persons who are liable to abate the nuisance complained of. In this case the nuisance was caused by the non-repair of the drain on the premises of the plaintiff, and there was no evidence of any obligation on the defendants to repair any part of that drain. That being so, I cannot say that the learned county court judge was wrong in holding that the nuisance was not caused by any act or default of the defendants. Possibly the argument for the plaintiff is rather stronger

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with regard to the twelve feet of drain, which carries only the defendants' sewage, than it is with regard to the rest of the drain which carries also the plaintiff's sewage. If, however, I am right in the views which I have expressed—that the liability does not depend upon user of the drain, but upon the obligation to prevent the nuisance, and, further, that s. 120 points to an apportionment of expenses between the owners or occupiers of property upon which the work is done—I think that the fact that a part of the drain carries only the sewage of the defendants is not sufficient to compel the Court to apportion a part of the cost upon them. For these reasons I am of opinion that the appeal must be dismissed.

KENNEDY J. I am of the same opinion. Although the question is not free from difficulty, I do not see my way to say that the judgment of the county court judge was wrong. There are considerations which lead me to prefer the contention for the defendants. Sect. 120, sub-s. 1, contemplates the case of a nuisance which is wholly or partially caused by the acts or defaults of two or more persons. That has reference to persons any of whom might properly be made subject to an application under the Act. I think that sub-s. 3 also refers to such persons; it assumes that the persons who may be brought in as contributories are persons who might originally have been proceeded against under the Act. The county court judge held that there was no evidence that the defendants were liable to repair the drain under the plaintiff's premises. If that be so, then it is clear, I think, that the defendants cannot be made liable under s. 120, sub-s. 3, because they could not have been originally proceeded against under the Act. It is said that, as owners of the dominant tenement, they had a legal right to repair the drain; but the right to repair does not involve the same legal liability under this Act as a legal duty to repair. If there was no duty upon them to repair, then they could not have been proceeded against under this section as persons by whose acts or defaults the nuisance has been caused; and the right to contribution only exists against persons who could have been so proceeded against. I think that this view is con-

firmed by the provisions of sub-s. 3, which say that contribution may be recovered, not only in respect of the costs of and incidental to the proceedings and abating the nuisance, but also in respect of any fine and costs ordered to be paid by the Court in those proceedings. It seems to me that it would be unjust to make a person liable for part of a fine and costs who neither has been proceeded against, nor could have been a party to the proceedings and so had an opportunity of being heard and meeting the charge. I am of opinion that it is impossible to say that the learned judge was wrong in holding that this case did not come within s. 120, sub-s. 3, of the Act.

RIDLEY J. I am of the same opinion. It appears to me that it is not within the purview of this Act that contribution should be obtained from every one who contributed in any way to the actual nuisance. The Act really deals with the persons who are liable to execute repairs in order to abate the nuisance, and it is not, I think, possible to accept the contention that the liability is imposed upon adjoining owners who have a right or easement in respect of the drains. I quite agree that it is impossible to say that a person is made liable to pay a part of a fine and costs imposed in proceedings to which he was not and could not have been made a party. Therefore I am not prepared to say that the decision of the county court judge was wrong.

Appeal dismissed.

Solicitors for plaintiff: *Wainwright, Pollock & Co.*
Solicitors for defendants: *Paines, Blyth & Huxtable.*

W. A.

1905
Feb. 2.

ROBINSON *v.* GREGORY.

Municipal Corporation—By-law—Validity, Evidence of—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 23, 24.

Upon a proceeding before a Court of summary jurisdiction to recover a penalty for breach of a by-law made by the council of a municipal borough under s. 23 of the Municipal Corporations Act, 1882, the production of a written copy of the by-law authenticated by the corporate seal is sufficient evidence until the contrary is proved, not merely that the by-law has been duly made, but also that all conditions precedent to its becoming a valid operative by-law, such as the fixing of a copy of the by-law for forty days on the town hall before it can come into force, have been complied with.

CASE stated by justices for the county of Wilts.

An information had been preferred by the appellant, an inspector of police, under by-law No. 6 of the by-laws made for the good rule and government of the borough of Swindon under the provisions of s. 23 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), charging that the respondent did frequent and use a certain street within the borough, either on behalf of himself or of some other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with some other person, contrary to the said by-law.

The by-law was in the following terms: "No person shall frequent and use any street or public place, either on behalf of himself or of any other person, for the purposes of bookmaking, or betting, or wagering, or agreeing to bet or wager with any other person."

Upon the hearing of the information the respondent pleaded not guilty, and evidence in support of the charge was taken which the justices considered disclosed a case for the respondent to answer, and which included evidence of the due making and existence of the by-law, namely, the production of a printed copy of the by-law authenticated by the corporate seal of the borough of Swindon. (1)

(1) At the end of the printed copy of the by-laws was a printed certificate under the hand of the town clerk, by which he certified (inter alia) that a copy of the by-laws was on May 15 sent to the Secretary of State, and that on the same day a copy was fixed on the town hall of the borough.

The respondent did not offer any affirmative evidence to shew that the by-law did not exist, or was not in force, or had not been duly made or published, but as a preliminary objection contended that the information must be dismissed because there was no evidence before the justices of any publication of the by-law, and he referred to *Motteram* v. *Eastern Counties Ry. Co.* (1)

The appellant relied upon s. 24 of the Municipal Corporations Act, 1882, and contended that the authenticated copy put in by him was sufficient evidence until the contrary was proved of the by-law being in force, and of compliance with the requirements of s. 23 of that Act, and that no further publication of the by-law was necessary, and that, even assuming publication was necessary, it ought to be presumed, and that it was for the respondent to disprove publication.

The justices were of opinion that the respondent's contention was well founded, and that in order to obtain a conviction the appellant ought to have given some evidence, however slight, that the by-law was published or promulgated after it came into force by virtue of s. 23 of the Municipal Corporations Act, 1882. They accordingly dismissed the information. (2)

The question for the opinion of the Court was whether the justices were right in dismissing the information on the ground stated.

Daldy, for the appellant. The production of the copy of the

(1) (1859) 7 C. B. (N.S.) 58.

(2) By 45 & 46 Vict. c. 50 (The Municipal Corporations Act, 1882), s. 23, sub-s. 1, power is given to the council of a municipal borough to make by-laws for the good rule and government of the borough. By sub-s. 2, a by-law is not to be made unless two-thirds of the council are present. By sub-s. 3, a by-law is not to come into force until the expiration of forty days after a copy has been fixed on the town hall. By sub-s. 4, it is not to come into force until the expiration of forty days after a copy, sealed with the corporate seal, has been sent to the Secretary of State.

By s. 24, "The production of a written copy of a by-law made by the council under this Act . . . . if authenticated by the corporate seal shall, until the contrary is proved, be sufficient evidence of the due making and existence of the by-law, and, if it is so stated in the copy, of the by-law having been approved and confirmed by the authority whose approval or confirmation is required to the making or before the enforcing of the by-law."

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by-laws authenticated by the seal of the corporation was sufficient evidence of publication, and, there being no defence on the merits, the respondent should have been convicted. Sect. 24 provides that the production of such a copy shall be sufficient evidence of the "due making and existence" of the by-law; which means that it shall be evidence, not merely that all the conditions for the making of a good by-law have been complied with, but also that the requirement as to fixing it on the town hall for forty days after it has been made and before it comes into operation has also been carried out. The expression "existence" of a by-law is only applicable to an operative by-law, and the sealed copy is therefore sufficient evidence that the by-law has been properly made and has come into force.

The respondent did not appear.

LORD ALVERSTONE C.J. I am of opinion that the justices ought to have convicted the respondent. The certificate under the seal of the corporation which was put in stated that the by-laws had been sent to the Secretary of State on May 15, and that copies had been affixed on the town hall on the same date. Sub-s. 3 of s. 23 of the Municipal Corporations Act, 1882, provides that by-laws shall be affixed to the town hall, and the section also provides certain limits of time which must elapse before the by-laws can come into operation, while s. 24 says that the production of a written copy made by the council, if authenticated by the corporate seal, shall, until the contrary be proved, be sufficient evidence of the due making and existence of the by-law. At first I was inclined to think that, inasmuch as the statute imposed two separate conditions as to the validity of the by-law, the certificate might only be sufficient evidence to shew that the formalities as to the actual making of the by-law had been complied with; but, upon consideration, I think it clear that, inasmuch as the certificate deals with the condition, the performance of which is necessary before the by-law can exist, and as the section has made the certificate primâ facie evidence both of the making and of the existence of the by-law, this objection ought not to prevail.

There being no merits in the respondent's case, the appeal will be allowed with costs.

KENNEDY J. I am of the same opinion. It seems to me that s. 24, which makes the production of a written copy of the by-law, if authenticated by the corporate seal, sufficient evidence of the due making and existence of the by-law until the contrary is proved, and the by-law having been approved and confirmed, covers all the provisions of sub-ss. 2, 3, and 4 of s. 23; until the contrary is made out, the certificate is sufficient evidence of the due making of the by-law. I think that the expression "due making" refers to s. 23, sub-s. 2, which provides that, "Such a by-law shall not be made unless at least two-thirds of the whole number of the council are present." Then, what is meant by "existence of the by-law"? The expression must mean existence of the by-law in an operative condition, which is provided for by sub-s. 3: "Such a by-law shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall"; and there are other provisions in sub-s. 4 as to the by-law not coming into force until certain things have been done. It seems to me that "making and existence" means the making of the by-law and its existence in an operative condition as an effective by-law; if so, there was here sufficient evidence.

RIDLEY J. I agree.

Judgment for the appellant.

Solicitors for appellant: *Robbins, Billing & Co., for Hilton, Town Clerk, Swindon.*

W. J. B.

C. A.
1905
Feb. 13.

[IN THE COURT OF APPEAL.]

HAMPSTEAD CORPORATION *v.* MIDLAND RAILWAY COMPANY.

Metropolis Management Acts—New Street—Paving Expenses—Land abutting on Street—"Owner"—Restrictions on User imposed by Special Act—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Act*, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77.

By the provisions of a special Act, inserted for the protection of a landowner, a railway company were bound to acquire all his land adjoining a certain street, and to leave a strip of land along the whole length of the street, and to plant the strip with trees and shrubs and fence it off from the street, and to maintain it in that condition. The company acquired the land, and planted and fenced a strip along and contiguous to the whole length of the street:—

Held, that the railway company were "owners" of the strip of land within s. 250 of the Metropolis Management Act, 1855, and therefore were liable to contribute to the expense of paving the street as a new street.

Decision of Bigham J., [1904] 2 K. B. 802, affirmed.

APPEAL of the defendant company from a decision of Bigham J. (1)

The facts appear sufficiently from the head-note and from the report of the case in the Court below.

W. Wills (*Montague Lush*, *K.C.*, with him), for the defendant company. The defendant company are not owners of the strip of land within s. 250 of the Metropolis Management Act, 1855, and are, therefore, not liable to contribute to the expense of paving the street in question. The decision of the House of Lords in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2) lays down the principle that where either by statute or by common law land has been placed "extra commercium," to use the language of Lord Watson, and is, so to speak, sterilised, so that the owner is deprived of the power of raising a rent from it, the owner is not the owner for the purposes of the Metropolis Management Acts.

(1) [1904] 2 K. B. 802. (2) (1883) 8 App. Cas. 687.

[ROMER L.J. That was a case of the parapets of a bridge over a cutting, and the House of Lords came to the conclusion that practically there was no land at all abutting on the street.

STIRLING L.J. The provisions in the special Act are inserted for the protection of a private owner, and the sterility spoken of is not expressed in such a way that it cannot be got rid of.]

The land is sterilised for the time being, and practically it is likely to remain so for all time. The principle above stated has been applied to a church, to a common, and to a public highway: *Angell* v. *Paddington Vestry* (1); *Plumstead Board of Works* v. *British Land Co.* (2) In the two former cases the sterility could not be removed except by statute, but in the case of a public highway the land could be brought intra commercium without the interference of Parliament. Therefore the test is not whether an Act of Parliament is required to put an end to the disability. The Court will have regard to the actual condition of the land, and will not insist that the restriction on the user should be absolutely perpetual if there is no reasonable probability of its removal.

[STIRLING L.J. referred to *Bowditch* v. *Wakefield Local Board* (3), where it was held that land conveyed to trustees for the purposes of a school under the powers of an Act of Parliament (4 & 5 Vict. c. 38, s. 2) which provided for the reverter of the land upon its ceasing to be used for those purposes, was not exempt from liability to contribute.

Macmorran, K.C., for the plaintiffs. That was followed by the Court of Appeal in *Hornsey District Council* v. *Smith.* (4)]

Those cases are distinguishable from the present case, because this is not the case of an owner voluntarily dedicating land for the purposes of a school or a chapel—*Wright* v. *Ingle* (5)—or for any other purpose, and reserving to himself the right to put an end to the disability, but is a case of a restriction imposed upon the owner by Act of Parliament.

Macmorran, K.C., and *Courthope-Munroe*, for the plaintiffs.

(1) (1868) L. R. 3 Q. B. 714.
(2) (1875) L. R. 10 Q. B. 203.
(3) (1871) L. R. 6 Q. B. 567.
(4) [1897] 1 Ch. 843.
(5) (1885) 16 Q. B. D. 379.

C. A. 1905

HAMPSTEAD CORPORATION v. MIDLAND RAILWAY.

VAUGHAN WILLIAMS L.J. I think that the judgment of Bigham J. is perfectly right. It seems to me that if the arguments addressed to us by the appellants' counsel were well founded the case of *Wright* v. *Ingle* (1) ought to have been decided differently, for in that case, as in this, unless and until there was a release, the land was extra commercium because it could not be dealt with for any other than the purpose in view. The whole difference between that case and the present one is that the present agreement is embodied in an Act of Parliament and the agreement in *Wright* v. *Ingle* (1) was not. I think that there is no substance in that difference, because one has only to look at the agreement in this case to see that it was an agreement arrived at by the parties and afterwards embodied in an Act of Parliament. In my opinion, this appeal must be dismissed with costs.

ROMER and STIRLING L.JJ. concurred.

Appeal dismissed.

Solicitors: *Beale & Co.; Arthur P. Johnson.*

(1) 16 Q. B. D. 379.

H. B. H.

[CROWN CASE RESERVED.]

1905
Jan. 21, 31.

THE KING *v.* LAWSON.

Criminal Law—Officers of Public Companies—Publishing Fraudulent Statements—Manager de facto—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 84.

Sect. 84 of the Larceny Act, 1861, which makes it a misdemeanour for "any director, manager, or public officer of any body corporate or public company" to publish false statements with intent to deceive or defraud, applies to a person who, without having been appointed an officer of the company, has in fact acted throughout as the manager of the affairs of the company.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by A. T. Lawrence J.

"1. Henry John Lawson was tried before me on the 22nd November, 1904, and following days at the Central Criminal Court on an indictment charging him under s. 84 of the Larceny Act, 1861, with unlawfully making, circulating, and publishing written statements false to his knowledge, with intent to induce persons to become shareholders in the Electric Tramway Construction and Maintenance Company, Limited.

"2. The said company was a limited company registered under the Companies Acts, 1862–1900.

"3. The articles of association (which were put in evidence) contained provisions empowering the board to appoint a manager.

"4. No minute of the board appointing a manager was in existence, and there was no evidence of any actual appointment of the prisoner as manager by the directors of the company.

"5. The nominal capital of the company was 250,000*l.*, divided into 250,000 shares of 1*l.* each.

"The issued capital consisted of 55,000 shares issued as fully paid.

"6. The whole of these shares with the exception of about 5000 were held by the prisoner or his nominees.

"7. The prisoner had given the then existing directors their

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share qualifications, and the said directors had executed blank transfers of such shares and lodged the same with the prisoner.

"8. The prisoner, with the assent and concurrence of the directors, dictated the policy of the company and managed its affairs. He also paid the expenses of publishing the incriminated matter.

"9. The indictment, counts 8–16 inclusive, charged the prisoner with publishing in the *Financial News*, the *Statist*, and a report or circular certain false statements.

"10. The prisoner submitted that he was not a 'manager' within the meaning of s. 84 of 24 & 25 Vict. c. 96.

"11. I directed the jury that if the prisoner was the person who in fact managed the affairs of the company he was a manager within the meaning of the section.

"12. The jury found the prisoner guilty.

"13. I sentenced him to twelve months' imprisonment with hard labour, but respited the execution of the sentence until after the decision of this case.

"The prisoner was admitted to bail.

"The question for the opinion of the Court is whether my direction to the jury was right.

"If right the conviction is to stand; if wrong the conviction is to be quashed.

"A. T. Lawrence.

"December 21, 1904."

Rufus Isaacs, K.C. (*Horace Avory, K.C.*, and *Kenneth Chalmers* with him), for the defendant. The case ought to be remitted to the learned judge, because paragraphs 7 and 8 do not correctly reproduce the effect of the evidence. These paragraphs shew that the judge thought that the defendant was managing the company in the sense that he was really pulling all the strings of the company, and that the directors were only acting as his puppets and doing as he directed them to do. To do so would not amount to being a manager within the meaning of the section, and the case should be sent back in order that the evidence bearing on this question should be set out.

Assuming, however, that the direction to the jury meant that the defendant if he was de facto the manager of the company (although not the manager de jure) could be convicted under the section, the direction was wrong. A person cannot be made criminally liable for having assumed to act in a certain position to which he has not been appointed. Of course such persons are civilly liable; but that turns on the doctrine of estoppel, which has no application to the criminal law.

In *Gibson* v. *Barton* (1) the judgment of the majority of the Court (Blackburn and Lush JJ.) was based on the idea that the manager there was a manager de son tort, and was in the same position as an executor de son tort. The defendant, however, adopts as his argument the dissenting judgment of Quain J. in that case. The case is distinguishable, as the person who there acted as manager was the appointed secretary of the company, and was therefore the servant of the directors.

Coventry and Dixon's Case (2), where *Gibson* v. *Barton* (1) was considered by Jessel M.R. and the Court of Appeal, does not add any authority to the case, because the question there was not a criminal one, and the observations of the Lords Justices in regard to the liability of de facto officers of a company were not necessary to their decision.

In *In re Western Counties Steam Bakeries and Milling Co.* (3) *Gibson* v. *Barton* (1) was again referred to, but the question was again not a criminal one. *Gibson* v. *Barton* (1), therefore, stands alone as an authority for the proposition that a person who is de facto and not de jure an officer of a company can be made criminally responsible. It cannot have been the intention of the Legislature that a person who without any kind of appointment has acted as an officer of the company should be made liable under the section.

Conflicting decisions have been given on this very point by the Common Serjeant and the Recorder of London at the Central Criminal Court. (4)

The manager contemplated by the section can only mean a

(1) (1875) L. R. 10 Q. B. 329.
(2) (1880) 14 Ch. D. 660.
(3) [1897] 1 Ch. 617.
(4) *Reg.* v. *Atkins*, (1900) 132 Central Criminal Court Sessions Paper, 399, 469.

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manager properly appointed, and a person who is not appointed under the terms of the Companies Acts cannot be brought within the terms of the section. [He referred to *Reg.* v. *Portugal.* (1)] It is plain from the Companies Acts, 1862–1890, that the manager of a company must be an officer or servant of the company, and the direction was wrong in not explaining to the jury that they must be satisfied that the defendant was a servant of the company. The section, being a criminal enactment, must be construed strictly: *Dyke* v. *Elliott* (2); *Attorney-General* v. *Sillem* (3); and the Court must be quite sure that the offence charged is within the letter of the law.

The Solicitor-General (*Sir E. Carson*), *H. Sutton*, and *R. D. Muir*, for the Crown, were not called upon to argue.

LORD ALVERSTONE C.J. In this case the first application made to us was to send the case back for some correction of paragraph 7 with regard to the qualifications given to certain directors, and of paragraph 8 with regard to the actual position of the defendant. This Court has power to send a case back if it finds upon the argument that the case has not been properly stated, and does not raise the proper point; and if the allegations which Mr. Isaacs sought to correct could be said to be the allegations upon which this direction of the learned judge depended, we should have had to consider whether or not we ought to ask the judge to restate it. But it seems to me that the allegations contained in paragraphs 7 and 8 are only matters of history which lead up to the point which the learned judge has submitted to the jury. It cannot be disputed that there was evidence in support of the direction which he gave to the jury which would justify the jury in coming to a conclusion of fact on that direction if the direction is right in law.

The direction was in these terms: "I directed the jury that if the prisoner was the person who in fact managed the affairs of the company he was a manager within the meaning of the

(1) (1885) 16 Q. B. D. 487. (2) (1872) L. R. 4 P. C. 184.
(3) (1863) 2 H. & C. 431.

section." If we must read that direction, which was given after a trial lasting a great many days, and which was no doubt the summary of a much fuller explanation of the facts to the jury—if we are to construe that direction as meaning merely that the defendant was pulling the strings behind the company and dictating the policy of the company, I should entirely agree that that was not being a manager within the meaning of the section.

It is, however, abundantly clear to my mind on reading the whole case that the learned judge when he used the words "managed the affairs of the company" did not mean merely directed its policy. It is plain from the earlier part of the case that he was quite alive to the effect of the expression "dictating the policy of the company," and he has in his final direction described the conduct of the defendant as of the person who in fact managed the affairs of the company. I understand that to be a direction to the jury that if the defendant was in fact the manager of the company he came within the section. Now, is that right or wrong? The argument for the defendant contended that the manager contemplated by the section must be a constituted officer of the company, or at any rate a person under the control of directors so as to be the servant of the company, and that therefore the direction is not sufficient because those conditions have not been explained to the jury. Construing the direction in the way I have indicated, does the case come within the section? This section was originally enacted in the year 1857. It was enacted in an Act the title of which is: "An Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property." Sect. 8 is for all practical purposes identical with s. 84 of the Larceny Act, 1861: "If any director, manager, or public officer of any body corporate or public company shall make, circulate," &c., "with intent to deceive or defraud" "he shall be guilty of a misdemeanour." In my opinion the mere perusal of the language of that section shews that the word "manager" cannot be used in a technical sense. "Director" is possibly a term of art; but ought the word "manager" to have the limited

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meaning for which Mr. Isaacs contends? He says the manager must be an appointed officer of the company at any rate, whether all the formalities of appointment have been complied with or not, and that the word in the section does not apply to a person who in fact manages the affairs of the company. It is not immaterial to note that prior to 1861 the only technical use of the word "manager" was in connection with the official manager, who was an officer of the Court who could act when companies got into difficulties in connection with winding up the affairs of the company. That cannot have been the manager referred to in this section. Therefore we have not before us anything that would lead us to think that the word "manager" is used in any technical or limited sense, and, looking to the mischief intended to be aimed at by the section, it seems to me that a de facto manager is as much a person whose conduct might be the subject of the section as a person who had been formally appointed manager. Therefore, if the case stood upon the section alone, and there was no authority upon it, I have a strong view that the direction of the learned judge was perfectly right, that a person who has in fact managed the affairs of the company is a manager within the meaning of that section.

But I feel it right to say that the argument to which we have listened has not displaced the weight of authority upon the point. Mr. Isaacs has criticised the case of *Gibson* v. *Barton*. (1) He has adopted the reasoning of the dissentient judge, Quain J. He has said that that case is not an authority on the present case, because the particular thing done by the person whose conduct was there implicated was something which must be done by an officer of the company. I confess I think that the language of Blackburn and Lush JJ. does not seem to support that distinction. The section there in question (s. 26 of the Companies Act, 1862) says: "And every director and manager of the company, who shall knowingly and wilfully authorize or permit such default," shall incur a penalty. In what sense are the words "director" and "manager" used in that section? Says Blackburn J. (2):

(1) L. R. 10 Q. B. 329. (2) L. R. 10 Q. B. at p. 336.

"When the section says 'director,' it is plain enough a director is a director, but the words are 'and manager.' We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transact the whole of the affairs of the company." The language of Lush J. can only be reconciled with the same view. He says (1): "Then is he a manager within s. 27? I think he is, and that 'manager' in that section must mean manager de facto. I do not think that it is competent for him to say, 'True, I acted as manager of the company; but yet, not being manager de jure, I can evade the liability imposed as between the public and the company by s. 26.'" No doubt the section we have now to consider is not the same section, and, if it could be shewn from the language of the section itself or from the character of the offence that there are reasons why the word "manager" in the present section should be construed in a more narrow sense, that decision would not be an authority. It seems to me, however, that the argument for the defendant has failed to shew any ground for applying a different principle to the construction of the present section. *Gibson* v. *Barton* (2) came before the Court of Queen's Bench in the case of *Edmonds* v. *Foster*. (3) It is right to say that the learned judges in that case do not express an opinion either one way or the other as to the correctness of the decision in *Gibson* v. *Barton* (2), but they certainly say nothing which shews that they had any doubt as to the opinion of the majority being correct. Lord Coleridge says (4): "It is unnecessary to discuss the opinions of the judges in *Gibson* v. *Barton* (2), but, so far as it goes, the decision of the majority is very strongly in point for the respondents." Archibald J. does not refer to the case. Amphlett B. says (4): "Upon the principle laid down by the majority of the judges in *Gibson* v. *Barton* (2), the appellant

(1) L. R. 10 Q. B. at p. 341.
(2) L. R. 10 Q. B. 329.
(3) (1875) 45 L. J. (M.C.) 41.
(4) 45 L. J. (M.C.) at p. 45.

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being a director is liable to be convicted." I mentioned that case, not as adding much weight to the authority of *Gibson* v. *Barton* (1), but as shewing that it came in 1875 before three judges, and that they did not throw any doubt upon it. But, in my opinion, *Coventry and Dixon's Case* (2) is much more important. There Sir George Jessel certainly went very far in supporting the principle of *Gibson* v. *Barton*. (1) He cites the language of Blackburn and Lush JJ. in that case, and then he says (3): "I agree with the judgment of Blackburn J., and Lush J. agreed with it, but my late lamented friend Quain J. did not agree with it." That case then went to the Court of Appeal. Sir George Jessel was overruled upon the point as to whether or not the act complained of was a misfeasance under the particular section which was then under consideration; but James L.J. says (4): "It was admitted by the appellants that these persons, as de facto directors, would be liable for any act of commission or any omission on their part in the same manner and to the same extent as if they had been de jure as well as de facto directors." Baggallay L.J. does not make any definite reference to the matter, but Bramwell L.J. says (5): "If he has done anything wrong as a de facto director, no doubt he can be got at under the clause."

It is contended, and the observation is well founded, that having regard to the decision in that case, to a certain extent those opinions of the Lords Justices are obiter. I only desire to say that I think certainly Lord Bramwell would not have hesitated to express his opinion if he thought Sir George Jessel had been wrong in the view he took of the decision of the majority in *Gibson* v. *Barton*. (1) The decision again came before the Court of Appeal in *In re Western Counties Steam Bakeries and Milling Co.* (6), where it was considered by Lindley, A. L. Smith, and Rigby L.JJ. I cannot at all agree with the view suggested, that Rigby L.J. did not agree with

(1) L. R. 10 Q. B. 329.
(2) 14 Ch. D. 660.
(3) 14 Ch. D. at p. 666.
(4) 14 Ch. D. at p. 670.
(5) 14 Ch. D. at p. 673.
(6) [1897] 1 Ch. 617.

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Gibson v. *Barton*. (1) I think the language of his judgment shews that he did. It is not too much, therefore, to say that some ten judges have had this case before them, and as far as I can see there is nothing to indicate that they thought the language of Blackburn and Lush JJ. wrong. Therefore, since the words of the section in question apply to a person who is called manager, and we find no technical meaning for that word at the time the Act was passed, I decline to accede to the argument that the word as used in the section can only have been intended to apply to persons who might be appointed managers under subsequent legislation. Finding the offence aimed at and contemplated by the section to be an offence the consequences of which might be just as serious if a de facto manager was guilty of the offence, and that the principle has been applied in *Gibson* v. *Barton* (1) and approved of, or at least not dissented from, by this large number of judges, I have myself no doubt in coming to the conclusion that the direction of A. T. Lawrence J. was right, and that the conviction must stand.

RIDLEY J. I am of the same opinion.

DARLING J. I only desire to say that my judgment does not all go upon the ground that was pressed upon us in the argument as being the basis of the decision in *Gibson* v. *Barton* (1) —that this defendant was a manager de son tort, and, therefore, for that reason properly convicted upon the indictment. To me that argument might in certain instances be a very technical one, and possibly at variance with the real facts in the case. But here the jury found upon plenty of evidence that the defendant was the person who in fact really managed the affairs of the company. That is a great deal more than being a manager de son tort in the narrow sense. The defendant was a person who was doing the things which, if there had been a manager, the manager would have done. He was, as far as I can see, the only person who did them, and to hold that he

(1) L. R. 10 Q. B. 329.

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was not the manager of the company would be to take an extraordinarily technical view in his favour, whereas I think that the real facts should be looked at, and that, the jury having properly found that he was in fact the man who did the things which a manager and only a manager could have done, he was properly indicted as manager, and properly convicted under the statute.

CHANNELL J. I also agree that this conviction should be affirmed. I want just to say that I personally agree with a considerable portion of Mr. Isaacs's argument. I think that this is one of a group of sections dealing with offences which can only be committed by persons who occupy certain positions, but I think they can be convicted if they occupy those positions quite apart from whether they happen to have been either duly appointed or appointed at all to those positions. It is necessary under this section both to charge in the indictment that the man was manager, and to prove it to the satisfaction of the jury. Of course, it is also necessary that there should be a proper direction to the jury as to what a manager within the meaning of the section is, and the only question that seems to me to be of any doubt in this case is whether this direction was quite correct. On the whole I interpret it in the way in which I think the direction ought to have been given. The learned judge says that the jury must find that the defendant was a person who in fact managed the affairs of the company; the direction does not say "managed the company." If that meant, or was understood to mean, that he was a person behind the scenes who controlled the whole of the policy of the company, because the directors and all the officers of the company were his puppets—if it only meant that, I should not think that that was being a manager within the meaning of the section. But the direction to the jury meant, as I think, if you find that the defendant was the person who did the acts in the management of the company as managing its business—"its affairs" is what is said in the direction—if you find that he did that, then it does not signify that there was

no appointment of him as manager. It seems to me that upon a fair interpretation of it that is what the direction must have meant, and I think that therefore it is correct.

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PHILLIMORE J. I agree, and I have nothing to add.

Conviction affirmed.

Solicitors for defendant: *Cox & Lafone.*
Solicitor for the Crown: *Solicitor to the Treasury.*

A. P. P. K.

[CROWN CASE RESERVED.]

1905
Jan. 28;
Feb. 20.

THE KING *v.* WILLIAM HENRY OSBORNE.

Criminal Law—Evidence—Indecent Assault—Particulars of Complaint made by Prosecutrix—Complaint elicited by Question—Admissibility.

The prisoner was indicted for an indecent assault on a girl under the age of thirteen years, whose consent to the act was therefore immaterial. At the trial evidence was admitted of the answer given by the girl to a question put by another child, in the absence of the prisoner, as to why the girl had not waited for the other child at the prisoner's house. The girl's reply was a complaint of the prisoner's conduct to her:—

Held, that the evidence was admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the girl and as evidence of the consistency of her conduct.

CASE stated by the chairman of the Worcestershire Quarter Sessions for the consideration of the Court for the Consideration of Crown Cases Reserved.

The prisoner William Henry Osborne was indicted at the Worcestershire Quarter Sessions on January 2, 1905, on an indictment containing two counts, the first being under s. 52 of the Offences against the Person Act, 1861, for an indecent assault upon Keziah Parkes, and the second charging him with a common assault upon her.

It appeared that the prisoner kept a fried fish shop at Kidderminster, at a distance of five minutes' walk from where Keziah Parkes, the prosecutrix, resided, and on the day in

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question Keziah Parkes, a girl of the age of twelve years, with her sister Nelly Parkes, aged eight, and a girl named Mary Moule, aged eleven, went to the prisoner's shop about 3.30 P.M. to buy fried potato-chips. They had been in the habit of going to the shop and selling dripping to the prisoner. Mary Moule asked the prisoner if he wanted any dripping, and he replied that they could fetch him some if they would come back at once. Mary Moule and Nelly Parkes went to fetch the dripping. Keziah Parkes asked if she should go with them, but the prisoner said, "No, stop with me." As soon as the other girls were gone, prisoner took Keziah Parkes into the back-kitchen, pulled her on to his lap, and indecently assaulted her. Keziah Parkes offered no resistance or objection. The prisoner left the kitchen to attend to a customer in the shop, and, when the customer left, the prisoner returned to the kitchen and asked Keziah Parkes to come back on his lap, but she refused and ran off towards home. On her way home she met Mary Moule and her sister coming back to the shop, and they asked her "why she was going home and why she did not wait till they came back." She had not spoken to them when this question was asked. Mary Moule was called, and was asked, when she met Keziah Parkes in the street, "Did you speak to her?" Moule replied, "Yes, I asked her why she did not stop for me." The question was then asked, "What did she say?" Counsel for the prisoner objected to this question on the grounds: (*a*) That an answer given by a prosecutrix to a question in a charge of indecent assault could not be given in evidence, as such an answer was not a complaint within the meaning of *Reg.* v. *Lillyman* (1); and (*b*) that, as the prosecutrix was under the age of thirteen, her consent was not material to the charge, and consequently any statement she made, whether in reply to a question or not, could not be given in evidence, as the rule in *Reg.* v. *Lillyman* (1) applied only to cases where want of consent was a material element in the charge. Counsel for the prisoner relied upon the decision in *Reg.* v. *Merry* (2), that an answer to a question was not a complaint; and also upon the decision

(1) [1896] 2 Q. B. 167. (2) (1900) 19 Cox C. C. 442.

in *Rex* v. *Kingham* (1), that where consent is not a material element the statement of the prosecutrix is not admissible. Counsel for the prosecution relied upon the decision in *Reg.* v. *Kiddle* (2), where it was decided that the rule in *Reg.* v. *Lillyman* (3) applied to cases where the girl on whom the offence was alleged to have been committed was of such tender years that the Court directed her evidence to be taken, but not upon oath, and where the question of her consent was immaterial. The chairman, being of opinion that the conduct of the prosecutrix in running away home and not waiting for her companions was part of the res gestae, and that her statement would be evidence why she ran away home, allowed the question to be put, on the authority of *Reg.* v. *Folly* (4) and *Reg.* v. *Kiddle.* (2) Moule replied to the question why the prosecutrix did not stop for her, "Because she did not like the prisoner, and would not go near him again, as he unbuttoned her drawers. That was all she said."

The prisoner when charged at the police station said, "She came and sat on my lap herself. She has done it many times, and is more to blame than me."

In summing up the chairman told the jury that it was immaterial whether the girl consented or not to what was done to her, but that they ought not to convict unless in their opinion there was corroborative evidence, and that the only corroboration of the girl's story was the statement of the prisoner at the police station. He did not refer in the summing-up in any way to the answer given by the girl Keziah Parkes to the question asked her by Mary Moule.

The prisoner was convicted, and judgment was postponed.

The questions of law for the Court were: (1.) Whether the fact that a statement made by a prosecutrix to a third person immediately after the alleged indecent assault was in answer to a question from such person prevented such statement being given in evidence in accordance with the rule laid down in *Reg.* v. *Lillyman.* (3) (2.) If such a statement could be given in evidence, although it was in answer to a question, did the

(1) (1902) 66 J. P. 393.
(2) (1898) 19 Cox C. C. 77.
(3) [1896] 2 Q. B. 167.
(4) (1896) 60 J. P. 569.

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fact that the offence charged was one where the consent of the prosecutrix was immaterial render such statement inadmissible? (3.) Could such a statement be given in evidence when the prosecutrix did not state that the act charged was done against her will?

J. R. V. Marchant, for the prisoner. The evidence was inadmissible. In order that hearsay evidence should be admissible, it must be brought within one of the well-recognised exceptions to the general rule excluding such evidence. The case is distinguishable from *Reg.* v. *Lillyman* (1), because there consent to the indecent conduct was a defence, the allegation being that the act was done against the will of the prosecutrix. Here from the age of the girl her consent was immaterial: 43 & 44 Vict. c. 45, s. 2. The principle of *Reg.* v. *Lillyman* (1) only applies to cases where consent is material: *Rex* v. *Kingham.* (2) *Reg.* v. *Kiddle* (3) and *Reg.* v. *Folly* (4) cannot be supported. In *Reg.* v. *Rowland* (5) Hawkins J. said that no case had been more greatly misunderstood nor more frequently misapplied than *Reg.* v. *Lillyman* (1), and that all that that case decided was that the terms of a complaint were only admissible as evidence of a want of consent by the prosecutrix. Evidence of the particulars of a complaint can, therefore, only be admitted where the question of the consent of the prosecutrix is in issue.

But, secondly, under no circumstances can a complaint made in answer to questions be admitted in evidence. That is a conversation, and not a voluntary statement: *Reg.* v. *Merry.* (6)

J. B. Matthews, for the prosecution. The evidence was admissible to prove the consistency of the conduct of the prosecutrix: *Reg.* v. *Lillyman* (1); *Rex* v. *Brasier* (7); and it is therefore immaterial that in this case her consent to the act charged was not in issue. The mere fact that a complaint is

(1) [1896] 2 Q. B. 167.
(2) 66 J. P. 393.
(3) 19 Cox C. C. 77.
(4) 60 J. P. 569.
(5) (1898) 62 J. P. 459.
(6) 19 Cox C. C. 442.
(7) (1779) Lea. 199; 1 East, P. C. 443.

preceded by a question does not of itself render the complaint inadmissible.

Marchant replied.

Cur. adv. vult.

Feb. 20. The judgment of the Court (Lord Alverstone C.J., Kennedy, Ridley, Channell, and Phillimore JJ.) was read by

RIDLEY J. In this case the prisoner Osborne was tried at the Worcestershire Quarter Sessions on an indictment containing two counts: the first for indecent assault, and the second for common assault on Keziah Parkes, a girl twelve years old. It appeared that Keziah Parkes, along with a younger sister and another girl named Mary Moule, of a similar age, went to a shop kept by the prisoner for the purpose of buying chips. Two of the girls—namely, Moule and the younger sister—went out of the shop on an errand, and during their absence the alleged assault was committed by him on Keziah. She then left the shop, and on her way home met Mary Moule with her sister coming back to the shop. Mary Moule was called at the trial, and was asked when she met Keziah Parkes in the street, "Did you speak to her?" Moule replied, "Yes; I asked her why she did not stop for me." The next question put to the witness was, "What did she say?" Objection was then taken for the prisoner that the witness's answer was not admissible in evidence, but the chairman admitted the evidence. The girl's answer was as follows: "Because she did not like the prisoner and would not go near him again, as he unbuttoned her drawers. That was all she said." The prisoner was convicted, and the point raised for our decision is whether this ruling was right. It was contended for the prisoner that the evidence was inadmissible—first, because the answer made by the girl was not a complaint, but a statement or conversation, having been made in answer to a question; and, secondly, because, as Keziah Parkes was under the age of thirteen, her consent was not material to the charge. As to the first point, the case of *Reg.* v. *Merry* (1) was quoted. In that case a question had been put to a girl of

(1) 19 Cox C. C. 442.

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nine years old by her mother in a case of indecent assault, and the learned judge ruled that, as the proposed evidence was a statement made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report what the question was that was put to the girl. It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but a question such as this, put by the mother or other person, "What is the matter?" or "Why are you crying?" will not do so. These are natural questions which a person in charge will be likely to put; on the other hand, if she were asked, "Did So-and-so" (naming the prisoner) "assault you?" "Did he do this and that to you?" then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first. In this particular case, we think that the chairman of quarter sessions acted rightly, and that the putting of this particular question did not render the statement inadmissible.

Upon the second point it was contended that, although under the decision of *Reg.* v. *Lillyman* (1) the particulars of a complaint made may, in some circumstances, be given in evidence on a charge of rape, that ruling does not extend to a charge of criminal knowledge or indecent assault, where, as in the present case, consent is not legally material. This contention is supported by *Rex* v. *Kingham* (2), decided in 1902; but, on the other hand, in *Reg.* v. *Kiddle* (3), decided in 1898,

(1) [1896] 2 Q. B. 167. (2) 66 J. P. 393. (3) 19 Cox C. C. 77.

it was ruled that the decision in question does extend to all charges of this character whether consent is a defence or not. In *Reg.* v. *Lillyman* (1) the prisoner was charged on an indictment containing three counts—first, attempt to have carnal knowledge of a girl above thirteen and under sixteen; second, an assault with intent to ravish her; third, an indecent assault. The prisoner was found guilty upon the first count only, and upon that count, in order to establish guilt, it was not necessary to prove want of consent. But the prosecutrix swore that what was done to her was done without her consent; and the Court in giving judgment said that, as she had so deposed, the complaint was admissible. Two points were taken and argued—first, whether the fact that the complaint was made was evidence; second, whether particulars of it could be given; and it is to the latter of these that the greater part of the judgment relates. This point was not argued before us, as distinguished from the first point, on the present occasion; and the only question, therefore, for our determination is whether, where consent is no part of the charge, the complaint is admissible. By the judgment in *Reg.* v. *Lillyman* (1) it was decided that the complaint was admissible, not as evidence of the facts complained of, nor as being a part of the res gestae (which it was not), but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains. Mr. Marchant argued upon this that the reasons so given were one only, and that the consistency of the complaint with the story given by the prosecutrix was material only so far as the latter alleged non-consent. If, however, that argument were sound, the words in question might have been omitted from the sentence, and it would have been sufficient to say that the complaint was admissible only and solely because it negatived consent. We think, however, if it were a question of the meaning of words, that the better construction of the judgment is that while the Court dealt with the charge in question as involving in fact, though not in law, the question of consent on the part

(1) [1896] 2 Q. B. 167.

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of the prosecutrix, yet the reasons given for admitting the complaint were two—first, that it was consistent with her story in the witness-box; and, secondly, that it was inconsistent with consent. The reasoning proceeded thus: On the second and third counts consent was material in law; on the first it was material in fact; there is, for this purpose, no difference between the two. It is not, therefore, because the charge itself involves proof of the absence of consent that the evidence is admissible; on the contrary, the prosecutrix herself can make it evidence by deposing that she did not consent when that is no part of the charge. In other words, whether non-consent be legally a necessary part of the issue, or whether, on the other hand, it is what may be called a collateral issue of fact, the complaint becomes admissible. But how does non-consent become a collateral issue of fact? The answer must be, in consequence of the story told by the prosecutrix in the witness-box. And the judgment treats the two cases on the same footing. If non-consent be a part of the story told by the prosecutrix, or if it be legally a part of the charge, in each case alike the complaint is admissible. But, if that is so, does not the reasoning apply equally to other parts of the story, and not merely to the part in which the prosecutrix has denied consent? If not, it seems illogical to allow, as the Court did allow, that the whole of the story may be given in evidence. The true result is, we think, that, while the decision in *Reg.* v. *Lillyman* (1) is not strictly on all-fours with the present case, yet the reasoning which it contains answers the question now raised for decision. But, however that may be, it appears to us that, in accordance with principle, such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix. In all ordinary cases, indeed, the principle must be observed which rejects statements made by any one in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought, under proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance. Did the woman make a

(1) [1896] 2 Q. B. 167.

complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is important for the jury.

It is in accordance with this view that in early times it was incumbent on the woman who brought an appeal of rape to prove that while the offence was recent she raised "hue and cry" in the neighbouring towns, and shewed her injuries and clothing to men, and that the appellee might raise as a defence the denial that she had raised the hue and cry. The passages in Bracton, De Coronâ, lib. iii. fol. 147, and in the Pleas of the Crown, Selden Society, vol. i., Warwickshire Eyre, A.D. 1221, p. 109; as also in the Mirror of Justices, Selden Society, vol. vii. Exceptions, cap. xxi. p. 103, are interesting and instructive as shewing that the distinction in this special class of case has been recognised from the earliest times. The hue and cry was the phrase used generally for the pursuit of a felon; but we have not found any other case than rape in which it was for the prosecution to shew that they had raised it, or in which it was a defence to shew that it had not been raised. It is, however, right to refer to a passage in Bracton, De Coronâ, lib. iii. fol. 139, in which he describes the objection made by an appellee that the hue and cry had not been raised as "ista generalis exceptio et prima" (see this passage referred to in the late Mr. Justice Stephen's History of Criminal Law, vol. i. 246). But it seems to have been specially applicable to this class of case only. A further weighty authority for the existence of this exception to an acknowledged general rule is to be found in Hale's Pleas of the Crown, vol. i. 633, where it is stated that the party ravished is to give evidence on oath; and her credibility must be left to the jury: "For instance, if the witness be of good fame, if she presently discovered the offence made pursuit after the offender, shewed circumstances and signs of the injury . . . . these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, ... and she made no outcry when the fact was supposed to be

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done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned." We think these words may be adopted as stating the law accurately, and they indicate that these complaints are to be admitted, not only because they bear on the question of consent, but also because they bear on the probability of her testimony in a case in which, without such or other corroboration, reliance might not be placed on her testimony. Our attention has been called to the case of *The Commonwealth* v. *Cleary* (1), decided in 1898 by the Supreme Judicial Court of Massachusetts. In that case the indictments were for unlawfully abusing a child under the age of sixteen years. The girl had made a complaint and the fact was given in evidence. No question arose as to the admissibility of its details; but the point reserved for the decision of the Court, on conviction of the prisoner, was whether the proof of this complaint could be admitted. The argument proceeded on the question whether it was too remote in point of time; but Holmes J., in giving the judgment of the Court, said: "It is not argued that the common law in cases of rape does not apply. See *Commonwealth* v. *Roosnell* (2); *Commonwealth* v. *Hackett*. (3) The rule that in trials for rape the government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal—Glanville, xiv. 6; Bracton, fol. 147 a; Fleta, 1, c. 25, § 14; St. 4 Edw. 1, St. 2. Appeals became obsolete and left rape to be dealt with by indictment before the development of the modern law of evidence." He then quotes the passage from Hale P. C. above set out, and says: "If it means what it has been taken to mean, that the government can prove fresh complaint as part of its original case, it cannot be justified by the general principles of evidence which now prevail. . . . The evidence is not admitted as part of the res gestae, or as evidence of the truth of the things alleged, or solely for the purpose of disproving

(1) (1898) 172 Mass. 175. (2) (1886) 143 Mass. 32.
(3) (1898) 170 Mass. 194, 196.

consent, but, for the more general purpose of confirming the testimony of the ravished woman. *Reg.* v. *Lillyman*." (1) And further on he says: "The test is whether, according to the principles of the exception, her having made the complaint tends to corroborate testimony given by the child at the trial." For these reasons the evidence was in that case held to be admissible. With that statement of the law we concur. We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent. For these reasons we think the conviction should be affirmed.

Conviction affirmed.

Solicitor for prosecution: *G. A. Weston, Kidderminster.*

Solicitors for defence: *Stallard & Turner, for A. Spencer Thursfield, Kidderminster.*

(1) [1896] 2 Q. B. 167, 170, 177.

A. P. P. K.

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Feb. 13, 18.

T. TILLING, LIMITED *v.* DICK KERR & CO., LIMITED.

Highway—Contract to execute Works—Obstruction—Raised Tramlines—Contractor—Liability—Limitation of Action—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*London County Tramways (Electrical Power) Act*, 1900 (63 & 64 *Vict. c. ccxxxviii.*), *s.* 6—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 25, 62.

Raised rails laid down by contractors in a thoroughfare for the temporary continuance of tramway traffic during the operation of reconstructing the tramlines for electric traction are not authorized by s. 6 of the London County Tramways (Electrical Power) Act, 1900, as work "necessary for adapting" the line "to be so worked."

The protection given by the Public Authorities Protection Act, 1893, does not extend to an independent contractor doing under contract, and for his own profit, work which a public authority has been authorized to do.

THIS was an action for damages caused by obstructions placed in certain thoroughfares by contractors employed by the London County Council to carry out the electrification of their tramways which raised two questions: (1.) Whether, on the construction of s. 6 of the London County Tramways (Electrical Power) Act, 1900, the laying down of temporary raised rails was authorized as "works necessary for adapting" the line to be worked by electricity; and (2.) whether contractors in the position of the defendants were entitled to the benefit of the Public Authorities Protection Act, 1893. The material facts were shortly as follows:—

The plaintiffs were omnibus and carriage proprietors owning a large number of public omnibuses which plied for hire by various routes in the principal thoroughfares of South London.

Early in the year 1903 the defendants, a large firm of contractors, were employed by the London County Council to reconstruct and electrify for them certain existing tramways in South London in accordance with the powers and provisions of the London County Tramways (Electrical Power) Act, 1900, the London County Council (Tramways and Improvements) Act, 1901, and the Tramways Act, 1870; and, by the contract

entered into between the London County Council and the defendants, the defendants undertook to execute the works therein described, and in a specification annexed, at a certain price. The specification provided amongst other things that the contract should include the provision and maintenance of all temporary lines, "turnouts" and "crossover" roads to be used during reconstruction so as to interfere as little as possible with the tramway traffic. The contract and specification also contained clauses casting upon the defendants the duty of observing the provisions of the statutes, and the responsibility for all damage caused by interference with traffic or otherwise; the material parts of clause 13, which particularly provided for the continuance of the tramway traffic during the reconstruction, were as follows: "The reconstruction, unless specially otherwise ordered by the engineer, is to be carried out upon one track only for each section opened at one time. The contractors shall provide all flush or raised temporary junctions and turnouts for diverting the horse-car traffic so that it can be carried on for both the up and down services on the track not in process of reconstruction, and they are to lay flush or raised temporary lines as required between the turnouts, if so ordered by the engineer, to ensure that the process of excavation, removal of pipes and sewers, or the general process of reconstruction shall interfere as little as possible with the regular tramway services along or crossing the route. Before any breaking up of the street is commenced the tramway traffic is to be established to the satisfaction of the engineer and the tramway manager over the substituted lines, and should any operation require any further provision of temporary lines to carry on the traffic, such provision is to be made by the contractors and the traffic satisfactorily established without extra charge before the work is proceeded with." By clause 14 the traffic was in no case to be suspended on more than one line.

The plaintiffs' case was—that the defendants in course of their operations had unlawfully obstructed certain thoroughfares by laying and maintaining upon the surface of that part of the road which was open for vehicular traffic, raised tram-

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rails in such a manner that the uppermost surface of such rails was not on a level with the surface of the road, as required by the Tramway Acts, but projected above it to the extent of the full depth of the rail, thereby committing a public nuisance; that in consequence of these obstructions the plaintiffs' omnibuses had been frequently injured. In addition to some sixty-nine specific instances of accident or injury given in their particulars, the plaintiffs also complained of damage caused by the undue and extra strain put upon their omnibuses when using these thoroughfares through being obliged to continually cross and recross these raised rails; and they further alleged that the upkeep of their omnibuses had been thereby increased, and the depreciation of their frames, axles, and wheels had been accelerated. The Court was not asked at the trial to assess the amount of damage sustained by the plaintiffs, but only to decide the question of the liability of the defendants, as it had been arranged that in the event of the defendants being held to be liable, the actual amount of damage suffered should be the subject of a further reference. The plaintiffs also alleged that the defendants had been guilty of negligence in carrying out their work, mainly on the ground that they had provided a set of temporary raised rails for carrying on a double line of tramway traffic while one side of the roadway was up for electrification, instead of being satisfied to use only "crossovers" to turn the tram traffic on to the existing single tramline. The defendants pleaded that what they had done was only done in pursuance or in execution of statutory powers, and as to sixty-seven of the sixty-nine specific instances of injury, which happened six months before the issue of the writ, they pleaded the benefit of s. 1 of the Public Authorities Protection Act, 1893. The statutory power relied on by the defendants was s. 6 of the London County Tramways (Electrical Power) Act, 1900 (63 & 64 Vict. c. ccxxxviii.), which provides that the London County Council, for the purpose of working the tramways by electrical power, may (inter alia) "reconstruct or make such alterations of the tramways and may execute all such works on or in connexion therewith in, over, or under the streets or

roads in which the same are laid as may be necessary for adapting the same to be so worked." The plaintiffs' contention on this was, that the laying of temporary raised rails for the convenience of the tramway traffic was not authorized by this section as work necessary for adapting the line to be worked by electricity.

The action was tried with witnesses before Warrington J., sitting as an additional judge of the King's Bench Division; but the only evidence called was confined to the suitability of the methods adopted by the defendants for temporarily carrying on the horse-car traffic. The result of the evidence is given in the judgment.

Avory, *K.C.*, and *J. A. Simon*, for the plaintiffs. Statutory powers do not justify a nuisance, or negligent working: *Rapier* v. *London Tramways Co.* (1) The special Acts of the London Tramways Company and the Tramways Act, 1870, s. 25, provide that the upper part of the rail must be on a level with the road; and by s. 62 the right of the public to pass with carriages across any tramway is not to be abridged. The defendants can, therefore, only justify their operations, if at all, by virtue of s. 6 of the London County Tramways (Electrical Power) Act, 1900, and the words of that section must be limited to works strictly necessary for adapting the line to be worked by electricity. These raised rails are for the benefit of the tram traffic, and for nothing else, and are not covered by statutory authority, and, therefore, the defendants are liable for any damages caused by unlawfully obstructing the thoroughfares.

The Public Authorities Protection Act, 1893, does not apply to independent contractors in the position of the defendants, who were carrying out this work for profit. The words in s. 1, "any person," must be read with some limitation, and not in their widest sense; they have been construed as confined to servants or officers of a public authority in *Parker* v. *London County Council* (2); *The Ydun* (3); *Greenwell* v. *Howell*. (4)

(1) [1893] 2 Ch. 588.
(2) [1904] 2 K. B. 501.
(3) [1899] P. 236.
(4) [1900] 1 Q. B. 535.

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The title of the Act is "for the protection of persons acting in the execution of statutory and other public duties." The title forms part of the Act: *Fielding* v. *Morley Corporation*. (1) These tramways are carried on for the purpose of earning profits; so that even the London County Council would not be entitled to the benefit of the Act: *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (2); a fortiori, therefore, the contractor is not protected; he is in no sense the servant of the London County Council: *Kent County Council* v. *Folkestone Corporation* (3); *Stringer* v. *Barker*. (4) The defendants are not acting in the execution of any public duty; they are simply carrying out the works undertaken by virtue of the contract, which they entered into for their own private gain, and the Public Authorities Protection Act, 1893, does not apply.

Ruegg, K.C., and *J. Pike Glasgow*, for the defendants. The London County Council was bound, for the benefit of the public, to see that the tramway service was interfered with as little as possible, and provided for this in their contract with the defendants. Temporary lines of some kind were a necessity: what the defendants did was only "work necessary for adapting the line to be worked" by electricity within the meaning of s. 6 of the London County Tramways (Electrical Power) Act, 1900; the carrying on of the existing traffic was an important part of the operations necessary for the reconstruction. The evidence shews that a raised rail was reasonably necessary for the work of reconstruction; and, if so, the obstruction to the thoroughfares was authorized by the Act of Parliament, and the defendants are protected. Assume, however, that the work was not authorized, then the defendants are entitled to the benefit of the Public Authorities Protection Act, 1893. The London County Council, had it been sued in consequence of these obstructions, could not have escaped liability by throwing the blame on the contractors: *Penny* v. *Wimbledon Urban Council* (5); but it could have availed

(1) [1899] 1 Ch. 1.
(2) [1900] 1 Ch. 749.
(3) Post, p. 620.
(4) [1879] W. N. 127.
(5) [1899] 2 Q. B. 72.

itself of the protection given by the 1893 Act. That Act is not confined to public authorities, but extends to every person who acts in pursuance or execution of any Act, or of any public duty or authority, and this includes their officials and agents: *Greenwell* v. *Howell.* (1) A corporate body can only act through its servants and agents; the defendants were the agents for the London County Council in carrying out these works, and the applicability of the protection given by the Act cannot depend on whether the plaintiff chooses to sue the corporate body or only the contractors, as the agents of that body, in respect of the acts done by the direction of and under the statutory authority given to the corporate body. The mere fact that the word "contractor" is not used in the 1893 Act cannot, according to the principles of the cases cited, deprive the defendants, as the servants and agents of the London County Council, of the benefit of the Act. In *Kent County Council* v. *Folkestone Corporation* (2) the contractor was not acting in pursuance of any statutory powers, nor was he the agent of the corporation for carrying out any public duty. That case, therefore, has no application to the present.

Avory, K.C., in reply. An independent contractor doing work for his own profit is in a very different position from the servants or officials of a public authority. It seems clear from *Kent County Council* v. *Folkestone Corporation* (2) that the Court of Appeal did not consider a contractor the agent of the corporation.

Cur. adv. vult.

Feb. 18. WARRINGTON J. The plaintiffs in this case sue the defendants for damage caused to their omnibuses by certain obstructions placed in the highways over which they travel by the defendants. The defence is twofold. The defendants say—(1.) That the obstructions were placed in the road under statutory authority; and (2.) that they are protected by the Public Authorities Protection Act, 1893, the action having been brought more than six months after the cause of action accrued. The plaintiffs say that even if the acts complained

(1) [1900] 1 Q. B. 535. (2) Post, p. 620.

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of were done under the statutory authority, the defendants were negligent in the exercise of their powers, and are therefore liable. I find that negligence is not proved, and, therefore, I need not deal further with this part of the case. The London County Council, prior to the year 1900, purchased, under statutory powers, the South London Tramways of the London Tramways Company, and by the London Tramways (Electrical Power) Act, 1900, provision was made for the substitution of electrical for horse traction on their tramways. The material section of this Act is the 6th. [Having read the section, the learned judge continued :—] The special Acts of the London Tramways Company and the General Tramways Act provide that the uppermost surface of the rail shall be on a level with the surface of the street, and that the rights of the public to pass over or along the streets shall not be abridged save as in the Acts provided. For the purpose of effecting the conversion of the South London system of tramways, the London County Council made a contract with the defendants, dated December 31, 1902, by which the latter undertook the work described therein, and in a specification annexed, at a certain price. The specification provided, amongst other things, that the contract should include the provision and maintenance of all temporary lines, turnouts, and crossover roads to be used during reconstruction, so as to interfere as little as possible with the tramway traffic. The contract and specification also contained provisions casting upon the defendants the duty of observing the provisions of the statutes, and the responsibility for all damage caused by interference with traffic or otherwise. Clause 13 of the specification particularly provided for the continuance of the tramway traffic. [The learned judge read the clause, and continued :—] At the trial, a portion of the Romney Road, opposite the Royal Naval College at Greenwich, was taken as an example of what had been done by the defendants. For the purpose of maintaining the traffic on a double line of rails, and with a desire at the same time to interfere as little as might be with the ordinary traffic, the defendants laid between the kerb on one side of the road and the permanent tramway a temporary line of rails, at the same time closing

altogether the other half of the road. The one half which was open for traffic was thus occupied by one of the two permanent lines and by the temporary line. The temporary line was constructed of rails with a bevel on either side from the ground to the height of two inches or thereabouts, and with a groove in the top to take the flange of the wheel; the uppermost surface of the rails was, therefore, not on a level with, but was above the surface of the street. At intervals there were clamps and nuts projecting above the surface of the raised rails. At the two ends of each section so dealt with, called a "turnout," a junction was made between the temporary line and the permanent tramway. The plaintiffs are omnibus proprietors using the roads on which the work was done. I find as a fact that the raised rails were an obstruction to the highway and caused damage to the plaintiffs' omnibuses. There is evidence, which I accept, that it would have caused great public inconvenience to interrupt the service of cars, and that less real interference to ordinary traffic is caused by the construction of a "turnout," such as I have described, than by carrying on the tram service on a single line with "cross-overs" at intervals. The first question is, Were the acts of the defendants authorized by the statutes? It is, I think, clear that the acts of the defendants would be a cause of action to the plaintiffs unless they were so authorized; and, further, that if the acts in question are authorized expressly or by necessary implication, the defendants would be excused, although the doing of them may occasion a nuisance, public or private. It is contended that the works constructed by the defendants are works necessary for adapting the tramways to be worked by electricity, and are, therefore, authorized by s. 6. [The learned judge read this section again, observing that the words in question appeared to point to permanent alterations, and not to temporary expedients for carrying on the tramway traffic, and continued:—]

I cannot adopt the defendants' construction; in my opinion the works they have constructed are not necessary for adapting the tramways to be worked by electricity, but were necessary (if at all) for maintaining the tramcar service uninterrupted.

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Works for this purpose are, in my judgment, not covered by the Act, and the defendants are accordingly not protected by it. Then arises the question whether, as to causes of action arising more than six months before the date of the writ, the action is barred by the 56 & 57 Vict. c. 61, the Public Authorities Protection Act, 1893. The full title is as follows: "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties"; and the 1st section runs thus: [The learned judge read the section, and continued:—]

It has been held that the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate: *Greenwell* v. *Howell and Another* (1); but there is no case deciding that it extends to independent contractors doing under contract, and for their own profit, the works which the public body is authorized to do. In the absence of authority I should have been prepared to hold that contractors, undertaking work for their own profit, are not within the protection of an Act passed as this is "for the protection of persons acting in the execution of statutory and other public duties." (As to reading the title as part of the Act, see *Fielding* v. *Morley Corporation*. (2)) I am glad to find that this view is supported by the decision of the Court of Appeal in *Kent County Council* v. *Folkestone Corporation*. (3) Without going through the facts of that case in detail, I may say that the question distinctly arose whether the statute applied to the case of contractors. Vaughan Williams L.J. said this: "But with reference to this particular point, upon which Darling J. really disposed of the action, I cannot agree with him, because, in my judgment, the Public Authorities Protection Act, 1893, has no application to this action, and for this reason, that the contractor who did the injury to the roads was in no sense the servant or agent of the local authority, the Folkestone Corporation." Romer L.J. dealt with the point as follows: "In the first place, it is clear to me that the Public Authorities Protection Act, 1893, has no application to this

(1) [1900] 1 Q. B. 535. (2) [1899] 1 Ch. 1.

(3) Post, p. 620.

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case. It was admitted, and rightly so, on behalf of the respondents, that this cannot be said to be an 'action, prosecution, or proceeding in respect of any alleged neglect or default in the execution of an Act of Parliament or of a public duty or authority.' But it was contended that it is an action, prosecution, or other proceeding against a person, which includes a corporation, 'for an act done in pursuance or execution, or intended execution, of the defendants' public duty or authority.' When the facts are considered it is I think clear that this action does not fall within the words which I have just read. The damage done to the road in question was done by certain contractors, and those contractors were not the servants or agents of the defendants in doing that damage. The contractors were simply persons who had contracted to deliver stone within the limits of the defendants' borough; and the way in which they should do that was a matter for them, and not for the defendants, to consider. Therefore it certainly cannot be said that the acts which caused the damage were done by the defendant corporation 'in pursuance or execution, or intended execution, of any Act of Parliament or any public duty or authority.' And I need scarcely point out that it certainly cannot be said that the contractors, when they did the damage, were acting 'in pursuance or execution, or intended execution, of any Act of Parliament, or in consequence of any public duty and authority,' for they had none. This to my mind shews that the Act of 1893 has no application to the present case." Stirling L.J. puts the case even more plainly. He says: "It is said that the Act of 1893 applies, and it is contended that this action was brought for an act done in pursuance or execution, or intended execution, of an Act of Parliament or a public duty or authority, an act done, it is said, by the corporation of Folkestone. Inasmuch, however, as the contractors were not the servants of the corporation, the act certainly was not done by the corporation, and in my judgment it was done by the contractors, and in doing it they were not acting in the execution of any public duty or authority, but, as I have already said, simply in performance of the private obligations which arose from the contract into which they

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had entered with the Folkestone Corporation. Therefore, in my judgment, the Act of 1893 has no application." In my opinion, therefore, the plaintiffs are entitled to the relief they ask. It is agreed that the damages are to be ascertained by some form of reference. I propose, therefore, to make a declaration that the plaintiffs are entitled to recover damages in respect of the matters complained of in this action, and to refer it to the official referee in rotation to ascertain the amount of such damages. The plaintiffs are also entitled to costs up to and including judgment; the subsequent costs must be dealt with by the referee.

Judgment for plaintiffs.

Solicitors: *Hicklin, Washington & Pasmore; William Hurd & Son.*

W. C. D.

C. A.

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Feb. 13.

[IN THE COURT OF APPEAL.]

HARBOTTLE *v.* ROBERTS. (PEEL, CLAIMANT.)

Practice — Interpleader — Appeal — Summary Decision — Leave to appeal — Amount in Dispute exceeding 50*l.* — *Order* LVII., *r.* 8.

Where, on interpleader proceedings, the amount in dispute exceeded 50*l.*, and a judge ordered that the matter should be decided in a summary manner under Order LVII., r. 8, but gave leave to appeal:—

Held, that the judge had jurisdiction to make the order, and that no appeal lay against it.

APPEAL from an order made by Bray J. at chambers as after mentioned.

A judgment creditor having issued execution by writ of fi. fa. upon the judgment, and the sheriff having seized certain goods in execution under the writ, the goods were claimed by the holder of a bill of sale. The value of the goods exceeded 50*l.* The sheriff interpleaded, and a master at chambers made an order that the matter should be decided in a summary manner by a master. On appeal by the execution creditor, Bray J. affirmed the master's order, but gave leave to appeal. The execution creditor appealed.

S. A. T. Rowlatt, for the claimant, took the preliminary objection that no appeal lay from the order of the judge in such a case. [He cited *Bryant* v. *Reading*. (1)]

E. Clayton, for the execution creditor. In this case the appeal lies. The judge gave leave to appeal, and, the amount in dispute being over 50*l*., there was no jurisdiction to determine the matter summarily without an issue. It appears from what was said by the Master of the Rolls in *Van Laun & Co.* v. *Baring Brothers & Co.* (2) that there is an established tacit rule of practice by which the exercise of the summary jurisdiction under Order LVII., r. 8, is, in the absence of consent, restricted to cases where the amount in dispute does not exceed 50*l*.

COLLINS M.R. I am of opinion that the preliminary objection is good. The case of *Bryant* v. *Reading* (1) is a conclusive authority to the effect that a decision in interpleader proceedings that the matter shall be disposed of in a summary manner stands for this purpose on the same footing as a decision of it in a summary manner. It was argued that, the amount in dispute in this case being over 50*l*., a rule, which has been called a rule of practice, to the effect that in such a case summary jurisdiction will not be exercised, applies, and therefore that the judge had no jurisdiction to order that the matter should be disposed of summarily. Such a rule, if there be one, clearly cannot be anything more than a mere rule of practice, and cannot restrict the statutory provisions on the subject; and, therefore, the fact that the amount in dispute exceeds 50*l*. cannot exclude the jurisdiction of the judge or master to decide the matter in a summary way. What I said in *Van Laun & Co.* v. *Baring Brothers & Co.* (2) was referred to as being to the contrary effect; but, when the expressions which I there used are looked at, they appear to be confirmatory of what I am now saying, and tend to shew that such a rule of practice as is relied upon cannot restrict the operation of the substantive provisions of an Act of Parliament or a statutory rule. That being so, the case is absolutely concluded

(1) (1886) 17 Q. B. D. 128. (2) [1903] 2 K. B. 277, at p. 281.

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by the authority of *Bryant* v. *Reading*. (1) It was suggested that the fact that the judge gave leave to appeal had the effect of taking the case out of that decision. But that is the very contention that was negatived in *Van Laun & Co.* v. *Baring Brothers & Co.* (2) For these reasons I think the appeal must be dismissed.

COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors for execution creditor: *Cohen & Cohen.*
Solicitors for claimant: *Freshfields.*

E. L.

C. A. 1905 *Feb.* 26.

[IN THE COURT OF APPEAL.]

DRESEL *v.* ELLIS AND OTHERS.

Practice—Married Woman—Costs—Separate Property—Restraint on Anticipation—Action brought by Married Woman—Appeal—Application for New Trial—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

Where, in an action brought by a married woman, an application by her for a new trial was dismissed with costs:—

Held, that the Court had jurisdiction under the Married Women's Property Act, 1893, s. 2, to order payment of those costs out of her separate property subject to a restraint on anticipation.

Hood Barrs v. *Cathcart*, [1894] 3 Ch. 376, and *Hood Barrs* v. *Heriot*, [1897] A. C. 177, distinguished.

ACTION by a married woman in respect of an alleged trespass to the plaintiff's house, and wrongful conversion of her goods.

Upon the trial before Lawrance J. with a jury, a verdict passed for the defendants, and judgment was thereupon given for them.

The plaintiff applied to the Court of Appeal for judgment or a new trial, but the application was dismissed with costs. The plaintiff had separate property subject to a restraint on anticipation.

Woodfin (*Kemp, K.C.*, with him), for the defendants, applied,

(1) 17 Q. B. D. 128. (2) [1903] 2 K. B. 277.

under the Married Women's Property Act, 1893, s. 2, for an order that the defendants' costs of the application for judgment or a new trial should be paid out of the plaintiff's before-mentioned separate property. In *Hood Barrs* v. *Cathcart* (1) and in *Hood Barrs* v. *Heriot* (2) it was held that an appeal by a married woman from an order made in an action in which she was defendant was not a proceeding instituted by her within the meaning of the Married Women's Property Act, 1893, s. 2; but the case of an appeal by a married woman from a judgment in an action in which she is plaintiff stands on a different footing, for in that case the litigation is instituted by her.

Firminger (*Hugo Young*, *K.C.*, with him), for the plaintiff. The terms of the judgments in *Hood Barrs* v. *Cathcart* (1) and *Hood Barrs* v. *Heriot* (2) appear to be equally applicable to a case in which a married woman plaintiff appeals and to one in which a married woman defendant appeals. An appeal or application for a new trial cannot be said to be an "action or proceeding instituted" by a married woman within the meaning of the Married Women's Property Act, 1893, s. 2.

COLLINS M.R. In my opinion it is clear that this case falls within the Married Women's Property Act, 1893, s. 2. That section, as interpreted by the decisions to which we have been referred, appears to put a married woman who initiates an action or other litigation in the position of being liable to have an order made against her for payment of any costs which she may be ordered to pay in that litigation out of her separate property, if any, which is subject to a restraint on anticipation. In the judgment of Davey L.J in *Hood Barrs* v. *Cathcart* (1), the grounds of which did not in any way differ from those upon which the other members of the Court proceeded, he appears to have dealt with the point now raised in terms. He said: "I have never myself heard of an appeal being 'instituted,' and I do not suppose any one ever heard of such an expression being applied to an appeal; whereas 'instituted' is an apt word for the commencement of a suit, and

(1) [1894] 3 Ch. 376. (2) [1897] A. C. 177.

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I think the use of the words 'from time to time' points out what is meant. The words are 'the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party,' and so on. That is to say, wherever a married woman commences an action or litigation as plaintiff, then, if, at any stage, or in any proceeding, in that action, she is ordered to pay the costs, the Court may, in such an action or litigation, order those costs to be paid out of her separate estate, notwithstanding any restraint on anticipation." It appears to me that what the learned Lord Justice there said applies precisely to such a case as the present, namely, that of an appeal or an application for judgment or a new trial by a married woman in an action commenced by her. I think, therefore, that we have jurisdiction to make the order applied for, and that such an order should be made.

MATHEW L.J. I am of the same opinion. Any difficulty, which might otherwise have existed upon the terms of the section, appears to me to be removed by the interpretation of it given in the judgments in the cases cited.

COZENS-HARDY L.J. I agree. There is nothing, as it appears to me, in the cases of *Hood Barrs* v. *Cathcart* (1) and *Hood Barrs* v. *Heriot* (2) which prevents us from making the order for which the defendants apply. In this case an action was instituted by a married woman, and the present proceeding is one in that action.

Order accordingly.

Solicitor for plaintiff: *H. W. H. Rance.*
Solicitor for defendants: *W. B. Glasier.*

(1) [1894] 3 Ch. 376. (2) [1897] A. C. 177.

E. L.

SCOTT & CO., APPELLANTS *v.* SOLOMON, RESPONDENT. 1905 *Jan.* 31.

Revenue—Licence to deal in Plate—Sale of Packets of Tea containing Coupons—Prizes consisting of Plate—Revenue Act, 1867 (30 *&* 31 *Vict. c.* 90), *ss.* 1, 3.

By 30 & 31 Vict. c. 90, s. 3, it is made an offence for a person to do any act or carry on any trade or business for which a licence to deal in plate is required without having a licence.

The appellants sold packets of tea each containing a coupon, and gave notice that they would give prizes, consisting, amongst other things, of gold watches, for the largest number of these coupons presented to them by persons during a certain period:—

Held, that this was a dealing in plate for which a licence was required, and that the appellants were, therefore, rightly convicted under the section.

CASE stated by justices.

The appellants were charged on an information under s. 3 of the Revenue Act, 1867 (30 & 31 Vict. c. 90), with dealing in plate without a proper licence in that behalf.

It appeared that the appellants carried on business as sellers of tea in various places.

With every packet of tea that was purchased from them a coupon was given, and the appellants advertised that they would give prizes of various values and descriptions for the largest number of these coupons sent in to them during a certain period. A large number of the prizes consisted of gold watches and articles of plate.

Witnesses were called before the justices who had obtained gold watches by means of this competition. They admitted in cross-examination that the tea was as good and the price of it the same during the competition as it was before and after the competition, but said that they understood that in purchasing tea during the competition they were purchasing the possibility of obtaining a gold watch or one of the other prizes.

It was admitted that the appellants had not a licence to deal in plate; and the justices found that they did deal in plate

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SCOTT & CO. v. SOLOMON.

without a licence within the meaning of the section. (1) They accordingly convicted them, but stated this case for the opinion of the Court.

Danckwerts, K.C. (*J. R. Atkin* with him), for the appellants. There was no dealing in plate here, and no licence was necessary. Sect. 1 of 30 & 31 Vict. c. 90, requires a licence for "Every person who shall trade in or sell any article composed wholly or in part of gold or silver." In order, therefore, to shew that a licence is essential it must be proved that the appellants either traded in or sold these watches. In *Grainger & Son* v. *Gough* (2) Lord Davey says: "Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased." In *Harris* v. *Amery* (3) Willes J. expressed himself in similar terms.

In taking penal proceedings the Crown must make the case absolutely clear: *Killick* v. *Graham* (4); and how can it be said here that there was a sale of these watches in any ordinary sense? The watches were really gifts to the persons sending in the largest number of coupons, and those persons need not themselves be purchasers of tea at all, but might have obtained the coupons from purchasers. There was evidence that full value was given for the money paid for the tea apart from the coupon.

The transaction was really a lottery: *Taylor* v. *Smetten* (5); and the Crown cannot require the appellants to take out a licence for conducting a lottery.

S. A. T. Rowlatt (*The Attorney-General* (*Sir R. B. Finlay*) with him), for the respondent. No doubt certain elements of chance entered into the transaction; but the customer with every pound of tea purchased a coupon, a sufficient number

(1) By 30 & 31 Vict. c. 90, s. 3, "Every person who shall do any act, or carry on any trade or business for which a licence to deal in plate is required by this Act, without having in force a proper licence authorizing him so to do, shall for every offence forfeit the sum of 50*l*. . . ."

(2) [1896] A. C. 325, at pp. 345, 346.

(3) (1865) 35 L. J. (C.P.) 89.

(4) [1896] 2 Q. B. 196.

(5) (1883) 11 Q. B. D. 207.

of which would entitle him to a gold watch. There was, therefore, a sale of the watches: *Hall* v. *McWilliam*. (1)

Danckwerts, K.C., replied.

LORD ALVERSTONE C.J. This case has been stated by magistrates, who had before them a summons under s. 3 of 30 & 31 Vict. c. 90, in respect of a person dealing in plate without a proper licence, the dealing being, as defined by the section, the doing any act or carrying on any trade or business for which a licence to deal in plate is required. That throws us back on s. 1—"any person who shall trade in or sell any article composed wholly or in part of gold or silver" must have a licence. The case seems to me to be near the line. If it could have been shewn that there was no evidence here of anything which amounts to either a sale or trading in these watches, we should have been bound, of course, to give effect to that contention. What happens is this: A large amount of tea is sold. With that tea is either sold, or at any rate is packed up, something called a coupon, which is a token indicating that the tea has been purchased from a particular shop. The evidence of one of the witnesses is: "I bought my tea at that shop before the competition began. . . . I understood that in purchasing the tea I was purchasing the possibility of obtaining a gold watch or one of the other articles." That is not conclusive on the matter, but it seems to me to point to one view of the facts, namely, that the sale was all one transaction. Each of the various purchasers got in return for the payment they made, not only the tea, but also this coupon. I do not think that it is disputed that there was a sale of coupons. Of course the suggestion that full value in tea was given in return for the price paid, meaning that there was nothing charged for these coupons, is simply absurd. This very large business of the appellants could not possibly be carried on if there were no charge for the coupons. The coupons having been delivered out with the tea, the persons who received them, either having purchased them themselves or having obtained them from other purchasers, on presenting them to the appellants become entitled to receive, amongst

(1) (1901) 85 L. T. 239.

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Lord Alverstone C.J.

other articles, a very considerable number of watches and other articles of plate. It seems to me that this is a trading in watches by means of receiving payments for them by instalments. The magistrates have thought that that was a dealing in plate, and I think it was a trading in or selling within the meaning of the 1st section of the Act.

The appellants relied upon the language of Lord Davey in the case of *Grainger & Son* v. *Gough* (1), but I am by no means sure that, even if the definition of trade given by him is applied in strictness, it would not cover the exact transaction here. It seems to me, however, that Lord Davey cannot have meant to say that there can be no trading unless the money for the article passes at the actual moment of its purchase. Some portion of the money paid for these watches passed when the coupon was given out, but the watch is not delivered out until a certain number of coupons are presented.

In the case of *Harris* v. *Amery* (2) Willes J. said, in regard to farming, that it was more a business than a trade: "It has never been doubted that farming was a business, though it could not be properly called a trade since the latter has the technical meaning of buying and selling." I cannot think that in using that expression Willes J. meant to say that there could be no trading unless the money was paid for the article at the time. I should have thought that trading by barter was also a method of trading within the mischief of this section.

Then it is suggested that this transaction is a lottery. Whether that is so or not, it seems to me that it would be wrong to find that there was no trading here because possibly the proceeding is a lottery.

I think, therefore, that the conviction must be affirmed.

KENNEDY and RIDLEY JJ. concurred.

Appeal dismissed.

Solicitors for appellants: *Chester & Co., for Holt, Risque & Robson, Manchester.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

(1) [1896] A. C. 325. (2) 35 L. J. (C.P.) 89, at p. 92.

A. P. P. K.

KEMP *v.* COMMISSIONERS OF INLAND REVENUE.

1904
Dec. 16, 20.

Revenue—Stamp Duty—Conveyance or Transfer—Devise of Real Estate—Assent in writing of Executor—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 62, *and First Schedule—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 3.

By s. 3, sub-s. 1, of the Land Transfer Act, 1897, "at any time after the death of the owner of any land his personal representatives may assent to any devise contained in his will . . . .":—

Held, that an assent in writing, made in pursuance of the above section under the hand but not under the seal of the executor, was not "an instrument . . . . whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person" within the meaning of s. 62 of the Stamp Act, 1891, and was, therefore, not liable to stamp duty as a conveyance or transfer.

CASE stated by Commissioners of Inland Revenue, pursuant to 54 & 55 Vict. c. 39, s. 13, for the opinion of the Court as to the stamp duty chargeable upon an assent in writing by an executor to a devise of real estate by his testator. The instrument upon which the question arose was in the following terms:—

"Whereas by an indenture dated the 15th day of September 1888 and made between Elizabeth Kemp of . . . . spinster of the one part and Arthur Joslen of . . . . of the other part the hereditaments and premises hereinafter described were (inter alia) conveyed by the said Elizabeth Kemp to the said Arthur Joslen by way of mortgage to secure the sum of 100*l.* and interest And whereas the said Elizabeth Kemp by her will dated the 10th day of November 1903 devised the said hereditaments and premises unto her nephew Alfred Kemp his heirs and assigns and appointed William Henry Simons of . . . . executor thereof And whereas the said Elizabeth Kemp the testatrix died on the 13th day of November 1903 without having altered or revoked her said will possessed of the said hereditaments and premises hereinafter described for an inheritance thereof in fee simple subject to the hereinbefore recited indenture of mortgage which will was duly proved by the said

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executor on the 30th day of December 1903 in the principal registry of the Probate Division of the High Court of Justice And whereas the said William Henry Simons has paid the funeral and testamentary expenses of the said Elizabeth Kemp and all her debts of which he has had notice Now he the said William Henry Simons as personal representative of the said Elizabeth Kemp deceased hereby signifies his assent to the devise by the said testatrix to the said Alfred Kemp of all that messuage house and premises known as . . . . now in the occupation of . . . . Subject to the said indenture of mortgage of the 15th day of September 1888 and to the principal money and interest thereby secured so far as the same relates to the said hereditaments and premises above described and also subject to a charge thereon for all moneys (if any) which the personal representative of the said Elizabeth Kemp is liable to pay. As witness the hand of the said William Henry Simons this 14th day of April 1904."

The object of the signature to the instrument by Simons was to give a good title to the hereditaments and premises therein mentioned in favour of Alfred Kemp, subject to the mortgage thereof, and the instrument was for that purpose handed to the mortgagee, in whose custody the title-deeds were. Simons in signing and handing over the document purported to be acting under the provisions of s. 3 of the Land Transfer Act, 1897.

The Commissioners, being of opinion that the instrument was an instrument whereby property on an occasion other than a sale or mortgage was transferred to or vested in Alfred Kemp within the meaning of s. 62 of the Stamp Act, 1891, assessed it as liable to the fixed duty of 10*s*. as upon a "Conveyance or Transfer not thereinbefore described" within the meaning of that heading in the 1st schedule to the Act.

The questions for the opinion of the Court were—(1.) whether the instrument was liable to duty as assessed by the Commissioners; (2.) if not, to what duty (if any) it was liable. (1)

(1) By 54 & 55 Vict. c. 39 (The Stamp Act, 1891), s. 62, "Every instrument, and every decree or order of any Court or of any Commissioners, whereby any property on any occasion, except a sale or mortgage, is trans-

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Cozens-Hardy, for the appellant. The assent of an executor under s. 3 of the Land Transfer Act, 1897, to a devise of lands by will is not a "conveyance or transfer of any kind not hereinbefore described" within the meaning of the schedule to the Stamp Act, 1891, nor does it fall within s. 62 of the latter Act as being an instrument whereby property is tranferred on any occasion except sale or mortgage. An assent on the part of an executor need not be in writing; it may be express or implied, and is generally a question of fact: Williams on Executors, 10th ed. 1104; and this principle applies equally to a devise of chattels real and a bequest of chattels personal: Shepp. Touch. 456; *Paramour* v. *Yardley* (1); *Young* v. *Holmes* (2); *Doe* v. *Mabberley*. (3) The legatee or devisee is in under the will, and not by virtue of the assent of the executor: *Saunders' Case*. (4) It is doubtless ordinarily convenient that the assent should be in writing, but that is merely in order to preserve evidence of the fact of the assent, and for this purpose it has been the practice of conveyancers to take an assent in writing or under seal. Where the assent is under

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ferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings." By the 1st schedule a duty of 10s. is imposed upon every "conveyance or transfer of any kind not hereinbefore described."

By 60 & 61 Vict. c. 65 (The Land Transfer Act, 1897), s. 1, sub-s. 1, "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

By s. 3, sub-s. 1, "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

(1) (1579) Plowd. 539.
(2) (1718) 1 Str. 70.
(3) (1833) 6 C. & P. 126.
(4) (1599) 5 Co. 12 b.

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seal different considerations might perhaps arise, but an assent in writing transfers no property and creates no fresh title; it merely completes the evidence of the title already created by the will. As soon as his assent has been given the executor ceases to have any further legal interest in the bequest or devise, and from that time the property is vested in the devisee, but it does not pass by the assent: see Bythewood's Conveyancing (1829), ii. 641; Hughes' Concise Precedents (1855), i. 400; Roper and White on Legacies (1847), i. 733. Further, s. 3 of the Land Transfer Act, 1897, provides that the executor may assent to the devise or may convey the land to the person entitled, thus recognising that an assent need not be a conveyance although equally efficacious in its effect. [He also cited *Thomlinson* v. *Smith* (1); *Adams* v. *Peirce* (2); *Stevenson* v. *Liverpool Corporation* (3); Cole on Ejectment (1857), 529.

Sir R. B. Finlay, A.-G. (*Rowlatt* with him), for the Crown. The Commissioners were right in holding that this document required to be stamped as a conveyance under s. 62 of the Stamp Act, 1891, and the schedule to that Act. The law applicable to the case is clearly laid down in Williams on Executors, from which it appears (p. 512) that chattels real go to the executor or administrator and vest in him, and terms of years, even when specifically devised (p. 516), will in the first instance vest in the executor by virtue of his office. It is immaterial that they vest in the executor only for the usual purposes to which the testator's assets are applied; the legatee cannot enter without the executor's special assent, and if he does the executor may maintain trespass or trover against him: Williams on Executors, p. 1103; *Saunders' Case.* (4) The effect of the executor's assent is thus stated in Williams, p. 1107: "At law, after an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee, so that he may bring ejectment, or trover, to recover it, even against the executor himself." The general rule of law, therefore, seems to be that, the legal interest in a chattel real being vested in the executor under the will, his assent

(1) (1678) Finch, 378.
(2) (1724) 3 P. Wms. 11.
(3) (1874) L. R. 10 Q. B. 81.
(4) 5 Co. 12 b.

operates to vest that legal interest in the devisee, and is in some shape necessary before the legal interest can so vest. In the present case the real estate has vested in the executor as though it were a chattel real, and his assent in writing to the devise, that is, to the vesting of the property in the devisee, is an instrument "whereby property on any occasion except a sale or mortgage is transferred to or vested in any person" within the meaning of s. 62 of the Stamp Act, 1891.

PHILLIMORE J. This case has taken some time in argument because I required to be fully satisfied that the legal estate in a chattel real, which has become vested in an executor by reason of the will of his testator coupled with probate of the will, could pass to the specific legatee or devisee of the chattel real without a formal assignment by deed. The decisions which have been cited by Mr. Cozens-Hardy, and the extracts from books of conveyancing precedents and from Williams on Executors referred to by him, shew that the legal estate can so pass, and that the only thing requisite to put the specific devisee or legatee in possession of the term is the will of the testator with the assent of the executor, and that in fact the legatee of a specific term gets the legal estate in that term, just as the legatee of a specific chattel gets the ownership of that chattel by the will of the testator, the assent of the executor merely meaning that he no longer requires the chattel real or personal for payment of the debts, funeral expenses, or general pecuniary legacies of his testator. That being the general law, the practice of conveyancers has been sometimes to take an assignment by deed from the executor; sometimes to have a document in writing called an assent, signed by the executor; and sometimes to allow the legatee to take possession, and rely upon possession and the receipt of the rents and profits, or some other act in pais of the executor as shewing assent. In cases where the document of assent is in writing it is stated in two works of authority—Jarman's edition of Bythewood's Conveyancing and Hughes' Concise Precedents—that no stamp duty is payable on the instrument; and I understand the Attorney-General to admit that it cannot be shewn that the

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Phillimore J.

Crown has ever insisted upon such assents being stamped, or, at any rate, that the question has never been raised for decision. In that state of the law, the Land Transfer Act, 1897, has in s. 1 established a real representative, and has provided that upon death the real estate of the deceased shall vest in his personal representative, executor, or administrator, as the case may be, as if it were a chattel real, and, by s. 3, that at the proper period the personal representative may assent to a devise, or may convey the land to the person entitled.

The present case raises the question whether an assent, not being under seal, is liable to stamp duty as a conveyance or transfer of property, as being an instrument whereby property on any occasion except a sale or mortgage is transferred to or vested in any person, and therefore chargeable with a fixed stamp duty of 10*s.* under s. 62 of the Stamp Act, 1891, and the 1st schedule thereto. It seems clear to me that the same law as regards liability to stamp duty must apply to such an assent to a devise of freehold estate as to a devise of chattels real, and that if the assent in the one case is subject to stamp duty so it must equally be in the other. I should be loth by my judgment in this case to sanction the view that, in all the cases where assents have been allowed to be executed without a claim for stamp duty, a mistake has been made by the authorities; but I think that the burden is very strongly upon the Crown to satisfy me that the view taken by conveyancers of experience and adopted in conveyancing books of repute, and which has never been hitherto challenged by the Crown, is incorrect. I am, therefore, unwilling to hold that assents in writing to bequests of terms of years require a stamp, and, if they do not, neither do assents in writing to devises of real estate. The Attorney-General relies upon the language of s. 62 of the Stamp Act, 1891, which says, "Every instrument, and every decree or order of any Court or of any Commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property," and he says that the assent in writing of the executor operates to vest the property in the devisee. I am not sure that it does. I think the true view of

the law is that it does not, and that the writing does not vest the property, but is merely evidence that the executor has no longer any claim upon the property, which really vests under the will of the testator. But even if this be otherwise, I think that the true view of s. 62 is to read it reddendo singula singulis, and that the verb "transferred" relates to the noun "instrument," and the verb "vested" relates to the "decree or order of any Court or of any Commissioners."

There is a further difficulty in the way of giving to the section the very wide construction for which the Attorney-General contends, because a will of lands was, at any rate at the time of the Stamp Act, an instrument whereby property was transferred, and certainly no one has suggested that a will requires to be stamped as a conveyance. A more striking instance is an appointment executed in consequence of a power by deed or will. I should be very sorry to hold that such an appointment executed by will was liable to stamp duty, although an appointment executed by deed no doubt is an instrument by which property is transferred. But, however that may be, I think, as I have already said, that the right way to read this section is reddendo singula singulis. No doubt it has become more important for the Crown to collect duty (if they can) upon these assents now that they will be much more numerous than they were in the past; but if the rule of law is that these assents are liable to duty, then the Crown has omitted to collect the duty, not perhaps in very frequent instances, but certainly over a great number of years. I think, upon the whole, that this instrument is not liable to stamp duty, and that the appellant is entitled to judgment.

Appeal allowed.

Solicitor for appellant: *E. W. Williamson.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. J. B.

C. A.

1905

Jan. 24.

[IN THE COURT OF APPEAL.]

In re An Arbitration between HULL and Another and LADY MEUX.

Landlord and Tenant — Agricultural Holdings — Farming Agreement — Covenant to stack and consume Hay and Straw on the Premises — Destruction by Fire—Compensation for Manurial Value—Agricultural Holdings Act, 1900 (63 & 64 *Vict. c.* 50), *s.* 1.

By an agreement for the letting of a farm the tenants agreed to stack upon the premises all the crops of hay and straw arising from the farm, and to consume on the farm all the hay, straw, chaff, and green crops arising therefrom, and to carry out and spread upon the farm in regular succession all the dung and manure arising therefrom. During the continuance of the tenancy some hay and straw stacked on the farm was destroyed by an accidental fire:—

Held, that, upon the termination of the tenancy, the landlord was not entitled, in answer to a claim by the tenants under the Agricultural Holdings Acts, 1883–1900, in respect of unexhausted improvements, to claim compensation for the loss of the manurial value of the hay and straw so destroyed as a breach of the agreement.

This was an appeal from a decision of the county court judge of Chippenham upon a special case stated by the umpire in an arbitration under the Agricultural Holdings (England) Acts, 1883–1900.

By a memorandum of agreement dated February 25, 1901, Lady Meux agreed to let to Robert Hull and John Newman a farm, in the parish of Christian Malford, from Lady Day, 1901, on a yearly tenancy, and the tenants thereby agreed to manage and cultivate the whole of the land in a good and husbandlike manner, keeping the same in good heart and condition, and to stack upon the premises all the crops of hay and corn arising from the farm, and to consume on the farm all the hay, straw, chaff, and turnips and other green crops arising therefrom, and to carry out and spread upon the farm in regular succession all the dung and manure arising therefrom. The tenancy was terminated on March 25, 1904. On March 21, 1904, the tenants gave notice in writing to Lady Meux under the Agricultural Holdings Acts, 1883–1900, of a claim for compensation in respect of unexhausted improve-

ments. On April 6, 1904, Lady Meux, in consequence of the claim of the tenants, gave them notice of a claim for compensation under the Agricultural Holdings Acts in respect of various matters under the contract of tenancy, including loss of the manurial value of hay and straw destroyed by fire in the summer of 1903. On May 28, 1903, an accidental fire occurred upon the farm, whereby a large quantity of hay and straw stacked thereon was destroyed. These matters were referred to arbitration under the Agricultural Holdings Acts, and each party appointed an arbitrator. The arbitrators, being unable to agree as to the construction of the agreement, appointed an umpire. Upon the application of the tenants an order was obtained directing the umpire to state a special case upon the question of law whether the landlady was entitled to compensation in respect of the loss of hay and straw destroyed by fire as a breach of the covenant contained in the agreement. The learned judge held that the claim of the landlady was not tenable. Lady Meux appealed.

H. H. Gregory, and *Bagot*, for the appellant. Under this covenant the intention was that the residual of the produce of the farm should go back to the land to keep it in good heart. If it does not go back, the land is impoverished and the covenant is broken. There is a strong presumption that the possibility of fire must have been in the contemplation of the parties in the case of such combustible materials as hay and straw. The learned judge held that the continued existence of the thing was an implied essential condition of the covenant. It is submitted that this is like the case of an absolute covenant to repair and that the covenant takes effect in any event. This case falls within the principle of *In re Arthur, Arthur* v. *Wynne* (1), *Proprietors of Brecknock and Abergavenny Canal Navigation* v. *Pritchard* (2), and *Bullock* v. *Dommitt* (3); and not within the principle of *Taylor* v. *Caldwell* (4); *Howell* v. *Coupland* (5); *Krell* v. *Henry*. (6)

(1) (1880) 14 Ch. D. 603.
(2) (1796) 6 T. R. 750; 3 R. R. 335.
(3) (1796) 6 T. R. 650; 3 R. R. 300.
(4) (1863) 3 B. & S. 826.
(5) (1876) 1 Q. B. D. 258.
(6) [1903] 2 K. B. 740.

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HULL AND LADY MEUX, *In re.*

[VAUGHAN WILLIAMS L.J. referred to *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1)]

Weatherly, for the respondents.

VAUGHAN WILLIAMS L.J. In my judgment this appeal ought to be dismissed. Speaking for myself, I do not think that there is any occasion to apply the doctrine laid down by Blackburn J. in the case of *Taylor* v. *Caldwell.* (2) I do not think we need have recourse to any implied condition that upon the failure of existence of something which was already in existence as was the case in *Taylor* v. *Caldwell* (2), or of something which was to come into existence as was the case in *Howell* v. *Coupland* (3), the further performance of the contract should be excused. I do not think we need rely upon any such principle in this case, though I am far from saying that if the words of the contract were such as to necessitate the application of that principle this is not a case in which that ought to be applied. But the view which I take of this case is this: This is a farming contract—a letting of a farm upon certain specified conditions. In my judgment, if you look at those conditions, the proper conclusion to draw is that they were introduced into this agreement for the purpose of ensuring proper cultivation of this land, the subject of the letting, according to good rules of husbandry. Now one thing which undoubtedly is for the advantage of the land is that the crops should be dealt with in such a manner that the land may not become impoverished. It seems to me that this contract provides that in a series of respects which are set forth therein the tenants shall undertake to deal with this farm in accordance with the principles of good husbandry. [The Lord Justice read the covenant, and continued:—]

In my opinion, according to the proper construction of the words of this clause, they relate only to things which have an existence on the farm and which can be dealt with actively or left passively for the benefit of the farm. Now the first obligation is "to stack upon the premises all the crops of hay and

(1) [1905] 2 K. B. 756. (2) 3 B. & S. 826.
(3) 1 Q. B. D. 258.

corn arising from the farm." It is obvious there that the covenant by its very terms only intends the tenants to deal with such crops of hay and corn as are in existence and capable of being stacked. Then the covenant proceeds: "and to consume on the farm all the hay, straw, chaff, and turnips and other green crops arising therefrom"—that is, arising from the farm. Again, according to my understanding of this contract, that is merely a regulation of acts of husbandry to be applied in cases where it is possible to apply them. The clause then proceeds: "and to carry out and spread upon the farm in regular succession all the dung and manure arising therefrom." Upon the true construction of this clause all these things are acts of husbandry to be done when the state of things on the farm is such that they can be done. If there is no hay or corn crop, or if there is no hay, straw or chaff, or turnips or other green crops remaining which can be consumed by the mouths of the cattle, this clause has no application whatever.

ROMER and STIRLING L.JJ. concurred.

Appeal dismissed.

Solicitors: *Upton & Britton; Collyer-Bristow, Hill & Co., for Wood & Awdry, Chippenham.*

H. B. H.

C. A.
1905
Jan. 23, 24;
Feb. 6.

[IN THE COURT OF APPEAL.]

BOW *v.* HART.

County Court—Jurisdiction—Action for Infringement of Registered Trade-mark.

The county court has no jurisdiction to entertain an action for an injunction to restrain an infringement of a registered trade-mark.

APPEAL from a decision of the Divisional Court (Lord Alverstone C.J. and Kennedy J.) reversing the decision of the judge of the Rochester County Court. (1)

The action was brought for an injunction restraining the defendant from infringing the plaintiff's trade-mark "Freedom Brand," registered on July 24, 1902, under No. 247,723 in class 42, and for 35*l.* damages; but the claim for damages was abandoned at the trial. The defendant gave notice that he would object to the jurisdiction of the county court to try the plaintiff's claim, and also that he intended to contest the validity of the plaintiff's trade-mark and to apply to the High Court to have it expunged from the register of trade-marks. The county court judge, after hearing the evidence, held that the defence raised put the plaintiff's right to the use of his trade-mark in issue, and that a decision on that point would in effect be a decision as to his right to have his mark retained on the register, and that this was a question that the county court had no jurisdiction to decide; and he, therefore, made no order in the action. The plaintiff appealed to the Divisional Court. It appeared on the hearing of the appeal that no application had been made by the defendant to the High Court to have the plaintiff's trade-mark expunged from the register. The Divisional Court held that the county court had jurisdiction to entertain the action. The defendant appealed.

Beddall and *Earle*, for the defendant. (1.) A registered trade-mark is a franchise within the exception in s. 56 of the

(1) [1904] 2 K. B. 693.

County Courts Act, 1888. Before the Patents, Designs, and Trade Marks Act, 1883, there was no right of property in a trade-mark; the right was merely a right to prevent the commission of a fraud: *Singer Manufacturing Co.* v. *Loog* (1), per James L.J.

[Stirling L.J. Lord Westbury frequently said that there was property in a trade-mark (2), and Lord Watson used similar language in *Somerville* v. *Schembri* (3), but the point was never treated as definitely settled.

Vaughan Williams L.J. Trade-mark was not recognised as property at common law: *Rodgers* v. *Nowill.* (4)

Romer L.J. In *Millington* v. *Fox* (5) Lord Cottenham speaks of the plaintiff's right to the exclusive use of a trade-mark.

Vaughan Williams L.J. In *Perry* v. *Truefitt* (6) Lord Langdale says that property cannot be acquired in a trade-mark, and he explains *Millington* v. *Fox.* (5)]

The dictum of James L.J. in *Singer Manufacturing Co.* v. *Loog* (1) has been quoted with approval by Lord Macnaghten in *Reddaway* v. *Banham* (7), and Lord Herschell there lays down the law in the same way. (8) The Act of 1883 alters the common law right, and confers upon the registered proprietor an exclusive privilege. This is analogous to the case of a patent, which has been held to be a franchise within s. 56 of the County Courts Act, 1888: *Reg.* v. *Halifax County Court Judge.* (9) This exclusive privilege is not the less a franchise because it is granted by Parliament instead of by the Crown.

[Romer L.J. Where does the Patents, Designs, and Trade Marks Act, 1883, confer any new right of property on the owner of a trade-mark?]

Sect. 76 provides that after the lapse of five years the registered proprietor shall have an absolute right to the exclusive use of the trade-mark, whereas before the Act he had no such

(1) (1880) 18 Ch. D. 395, 412.

(2) [See the cases collected in Sebastian's Law of Trade Marks (4th ed.), p. 167, note (*b*).—H. B. H.]

(3) (1887) 12 App. Cas. 453, 457.

(4) (1847) 5 C. B. 109, 122.

(5) (1838) 3 My. & Cr. 338, 352; 45 R. R. 271.

(6) (1842) 6 Beav. 66, 73.

(7) [1896] A. C. 199, 215.

(8) [1896] A. C. at p. 209.

(9) [1891] 1 Q. B. 793; [1891] 2 Q. B. 263.

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right. During the five years the right is not an absolute but an accruing right; but it is none the less a new right.

[ROMER L.J. The Act is a statutory recognition of the law which had been previously laid down by the Court of Chancery, but it provides a better method of procedure.]

(2.) The provisions of the Act of 1883, which is a complete code in itself as to all matters relating to patents, designs, and trade-marks, and of the amending Acts shew that the Legislature intended that the High Court should have exclusive jurisdiction in all proceedings under the Act except where otherwise specified: see ss. 117, 31, 77, 77 (*a*), 90, 112 (*a*) of the principal Act as amended. *Reg.* v. *Halifax County Court Judge* (1) is an authority on this point also as regards an action for infringement of a patent, and the same principle applies to the case of a registered trade-mark.

[ROMER L.J. In the case of a patent action the Act contains very special provisions as to costs: see s. 29; but there are no similar provisions as regards an action for infringement of trade-mark.]

Sect. 117 provides that in and for the purposes of the Act "the Court" means the High Court of Justice. That definition applies generally to proceedings under the Act, and is not limited to cases where the words "the Court" are expressly used; and, further, the Legislature frequently speaks of "the Court" in that part of the Act (Part IV.) which deals with trade-marks: see ss. 62, 71, 72, 90. Sect. 77 (*a*), which is incorporated into the principal Act by s. 18 of the Patents, Designs, and Trade Marks Act, 1888, empowers the Court to certify in an action for infringement of a registered trade-mark that the right to the exclusive use of the trade-mark came in question, with the result that the plaintiff, if successful in any future action, is entitled to solicitor and client costs. That corresponds to s. 31 of the principal Act as regards patents. Further, by s. 90, an application to remove a trade-mark from the register must be made to the High Court, and the common practice in an action for infringement of trade-mark where the validity of the mark is called in question is to hear the action

(1) [1891] 2 Q. B. 263.

and the motion to rectify together. The Act contains no express provision limiting the jurisdiction to try an action for infringement either of a patent or of a trade-mark to the High Court; but it is improbable that the Legislature should have contemplated that an action for infringement could be tried in the county court if the validity of the patent or trade-mark was not called in question, but could only be tried in the High Court if it was. Moreover, the fact that s. 77 (*a*) is inserted immediately after s. 77, which deals with proceedings for the infringement of a trade-mark, affords a further indication of the intention of the Legislature. So, by s. 112 (*a*), which was added by s. 26 of the Act of 1888, jurisdiction in trade-mark cases is expressly conferred on the Palatine Court, which otherwise would have had no jurisdiction in these cases.

[STIRLING L.J. The Palatine Court always exercised jurisdiction in patent cases and trade-mark cases, and the only effect of that section was to give the Court the additional jurisdiction conferred by the principal Act, e.g., to take a trade-mark off the register.]

Spokes, for the plaintiff.

[VAUGHAN WILLIAMS L.J. We do not think that a trade-mark is a franchise.]

As regards patent actions, the machinery provided by ss. 28–31 of the Act of 1883 is not applicable to county court actions, and that was the ground of the decision of the Court of Appeal in *Reg.* v. *Halifax County Court Judge* (1); but the Act contains no special machinery as regards actions for infringement of trade-marks.

[ROMER L.J. If the High Court alone can certify under s. 77 (*a*), does not that shew that only the High Court can entertain these actions?]

For certain matters recourse must be had to the High Court, but there is nothing in the infringement sections referring to a Court at all. If the validity of the mark is called in question, the action can easily be transferred to the High Court. Sect. 117 only means that whenever the words "the Court" occur in the Act then the High Court is intended.

(1) [1891] 2 Q. B. 263.

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Apart from the Act, an action for infringement of a trade-mark could be brought in the county court.

[Romer L.J. I do not think that the county court had any jurisdiction to grant an injunction in the case of a trade-mark.

Vaughan Williams L.J. Sect. 1 of the County Courts Act, 1865, which confers an equitable jurisdiction upon the county court in certain cases, does not include trade-marks.

Stirling L.J. referred to *Stiles* v. *Ecclestone*. (1)]

That case decides that the county court may always grant an injunction in a case in which the damages, if claimed, would not have exceeded the amount within the jurisdiction of the county court. Independently of the County Courts Act, 1888, the county court had jurisdiction to try a trade-mark action by virtue of ss. 24 and 89 of the Judicature Act, 1873. Under s. 58 of the County Courts Act, 1846, a passing-off action might have been brought in the county court in cases under 20*l*., and the effect of the Judicature Act was to enable the county court to grant an injunction in those cases; and there is nothing in the Patents, Designs, and Trade Marks Act, 1883, to take that right away. By the County Courts Act, 1888, the limit of damages has been raised to 50*l*.

[Vaughan Williams L.J. The Act of 1883 gives to the registered proprietor of a trade-mark a new statutory right of action. Therefore, prior to that Act, the county court could not have had jurisdiction to try that action.]

If the words of the Act of 1846 apply to all personal actions within a certain limit, then the county court must have jurisdiction in respect of any personal action within that limit subsequently created by statute, unless expressly excepted.

Beddall, in reply. In construing an Act of Parliament the Court will be guided by the intent of the Legislature, even though it be contrary to the letter: *Stradling* v. *Morgan*. (2)

Cur. adv. vult.

Feb. 6. Vaughan Williams L.J. delivered the judgment of the Court as follows:—This is an appeal from a Divisional

(1) [1903] 1 K. B. 544. (2) (1560) Plowd. 199, 205.

Court of the King's Bench Division, which reversed the decision of the judge of the Rochester County Court. The question in the case is whether the county court judge had jurisdiction to try an action brought in respect of an alleged infringement by the defendant of the plaintiff's registered trade-mark. In that action the plaintiff claimed an injunction to restrain the defendant from infringing the trade-mark, and also an account or damages. The claim for damages was, however, abandoned.

At the trial it was urged that the county court had no jurisdiction—first, because the registration of a trade-mark under the Act of 1883 amounts to the grant of a franchise, and s. 56 of the County Courts Act, 1888, which defines the jurisdiction of county courts, excludes from the cognizance of the county court any action in which the title to a franchise shall be in question, and the defence raised by the defendant in this case put the plaintiff's right to his trade-mark in issue; and, secondly, on the ground that actions for infringements of trade-marks can only be brought in the High Court. The learned county court judge was of opinion that registration of a trade-mark was not the grant of a franchise. He had some doubt as to whether an action for infringement of a trade-mark could be brought in the county court even in a case where no question as to the right of the plaintiff to the trade-mark was in issue, but he made the following order: "It appearing that the defence to this action puts in issue the question of the plaintiff's right to the exclusive use of his registered trade-mark, and his right to have such trade-mark continued on the register, which is a question which this Court has no jurisdiction to decide, I do not think fit to make any order in this action." The Divisional Court reversed this decision, and held that the county court judge had jurisdiction; and we have to consider whether the Divisional Court is right.

I approach the case with diffidence, because I agree with Lord Alverstone that it raises a question of considerable importance and difficulty—a question, indeed, as to which the Chief Justice himself expressed his anxiety that his decision should be reviewed by the Court of Appeal. The case is certainly one of difficulty, but I think that in the Court of Appeal we

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have had the advantage of arguments on points which were not raised in the Divisional Court. The Lord Chief Justice and Kennedy J. both agreed with the county court judge that a trade-mark is not a franchise within the meaning of the exception from county court jurisdiction contained in s. 56 of the Act of 1888. I agree. The decision in *Reg.* v. *Halifax County Court Judge* (1) on a question of franchise only applied to actions relating to infringements of patents, which actions were excluded from the cognizance of the county courts, because a patent right is a franchise within the meaning of s. 56 of the Act of 1888. I think that the registration of a trade-mark does not give to the owner of the trade-mark a privilege granted by the Crown in right of its prerogative. Registration of a trade-mark under the Patents, Designs, and Trade Marks Act, 1883, only affects the rights of proprietors of trade-marks in legal proceedings for infringement, and the conditions under which actions for infringement can be brought, and the effect of proof of registration in support of the plaintiff's case. There is nothing, it will be observed, in ss. 75, 76, and 77 in the part of that Act dealing with the effect of registration to suggest a grant of a privilege in derogation of the common law rights of other subjects of the Crown. The Act assumes that in a sense there may be property in a trade-mark, and provides for the protection of that property by a statutory system of registration, and regulates the proceedings to obtain registration or to object thereto, and the correction of the register. But this is all that this Act or the amending Act of 1888 seems to me to do in respect of trade-marks.

But, even though the registration of a trade-mark under these statutes does not operate as the grant of a franchise, and therefore does not make an action for infringement of a trade-mark fall within the exception in s. 56 of the County Courts Act, 1888, as being an action in which the title to a franchise is in question, yet it may be that the jurisdiction of the county court is excluded by the express terms of the Patents, Designs, and Trade Marks Acts. Great reliance was placed by counsel for the defendant upon the definition in s. 117

(1) [1891] 2 Q. B. 263.

of the Patents, Designs, and Trade Marks Act, 1883, "'The Court' means Her Majesty's High Court of Justice in England," and upon the fact that in ss. 62, 71, 72, 81, sub-ss. 5, 12; s. 90, sub-ss. 1, 2, 3, the word "Court," in the sense of the High Court of Justice in England, is used in respect of trade-marks. An argument was also based upon the fact that, by s. 18 of the Act of 1888, it is provided that, in an action for infringement of a registered trade-mark, the Court or a judge may certify that the right to the exclusive use of the trade-mark came in question, and that if the Court or a judge so certified, then in any subsequent action certain consequences as to costs should follow; and it was urged that, as it was manifest that this certificate could only be given in the High Court, this pointed strongly to the conclusion that an action for the infringement of a registered trade-mark could only be brought in the High Court of Justice. I think, for my own part, that there is considerable force in these arguments, especially as the definition of "the Court" is stated to be "in and for the purposes of this Act"—that is, the Patents, Designs, and Trade Marks Act, 1883. I do not, however, think that the decision in *Reg.* v. *Halifax County Court Judge* (1) is conclusive in favour of these contentions, although, in my opinion, it tends strongly in that direction. It may be, however, that the decision of the Court of Appeal in that case was based upon the special provisions in the Act with regard to the trial of patent actions.

But there is a further point to be considered, and that is that, even assuming that the definition of "the Court" in the Patents, Designs, and Trade Marks Act, 1883, does not exclude the jurisdiction of the county court in actions for infringement of trade-marks, yet one has to examine the County Courts Acts to see if by those Acts any jurisdiction is given to the county courts in actions for the infringement of trade-marks. It is said that the jurisdiction is given by s. 56 of the County Courts Act, 1888, which in substance is identical with s. 58 of the County Courts Act, 1846, the sum of 50*l.* in the later Act being substituted for the sum of 20*l.* in the earlier Act. The

(1) [1891] 2 Q. B. 263.

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words relied upon as giving jurisdiction, under either Act, are the words, "all personal actions where the debt, demand, or damage" (in the later Act), "debt or damage" (in the earlier Act) "is not more than," &c.

Prior to the Judicature Act, 1873, there was a difference between the Common Law Courts and the Equity Courts with respect to actions to enforce the right to trade-marks. This is well pointed out in *Singer Manufacturing Co.* v. *Wilson* (1) by Mellish L.J., who says: "To give a right of action at common law, the thing must have been done fraudulently, it must have been intended to deceive. But the Courts of Equity said, If you have purchased goods with another man's trade-mark upon them, although you may have done it perfectly honestly, not knowing that it was another man's trade-mark, or if you have manufactured goods for somebody else, who has ordered you to manufacture them with a certain trade-mark upon them, and you have manufactured the goods with that trade-mark upon them, perfectly honestly, and not knowing that you were doing anything wrong in putting that trade-mark upon them, yet, nevertheless, you cannot be allowed to put the goods into the market with that trade-mark upon them, because the effect of it will be that the goods will pass from hand to hand as being goods manufactured by the person whose trade-mark it is; and therefore you shall be restrained from doing that." That case was appealed to the House of Lords (2), and the decision of the Court of Appeal was reversed; but Lord Cairns says, with reference to the point now under consideration (3): "That there have been many cases in which a trade-mark has been used, not merely improperly but fraudulently, and that this fraudulent use has often been adverted to and made the ground of decision, I do not doubt; but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark." The present action is not based on fraud; it seeks to restrain (in the language of Lord Cairns) an "improper," as distinguished from a "fraudulent," use of the trade-mark.

(1) (1876) 2 Ch. D. 434, 454. (2) (1877) 3 App. Cas. 376.
(3) 3 App. Cas. at p. 391.

Such relief was, prior to the Judicature Acts, only given in Courts of Equity, and consisted in an injunction and an account of profits; damages could not be awarded until after the passing of Cairns's Act.

Now, in 1846 the county courts had no equitable jurisdiction, and the Common Law Courts could not have entertained an action for an injunction to restrain the infringement of a trade-mark, while the Courts of Equity, although exercising this jurisdiction, could not have given damages, and, even after the passing of Cairns's Act, could only have given damages by way of a subsidiary alternative. By s. 1 of the Act of 1865, an Act to confer on the county courts a limited jurisdiction in equity, the power and authority of the High Court of Chancery in certain suits and matters was conferred on the county courts; but this Act certainly did not confer upon the county courts authority to entertain an action for an injunction or to give damages under Cairns's Act. I find, therefore, nothing in the County Courts Acts to confer this jurisdiction.

Then it is said that the jurisdiction is given by the Judicature Act, 1873, ss. 24, 89, the former of which sections gives to the High Court, whether in the King's Bench Division or the Chancery Division, all the power and authority exercised by the Chancery Division, while the latter section gives to every inferior Court which has jurisdiction in equity or at law and in equity as regards all causes of action within its jurisdiction the power to grant in any proceeding before the Court all the remedies which could be given in the High Court; and it is said that the county court, having the jurisdiction to entertain a personal action, where the debt, demand, or damage is not more than 50*l.*, can, by s. 56 of the Act of 1888, entertain the present action, and grant an injunction to restrain the defendants from infringing the plaintiff's trade-mark. I cannot agree. Such an action would not have been a personal action within the meaning of that word in s. 58 of the Act of 1846, nor do I think that it comes within the meaning of the same word in s. 56 of the Act of 1888; and s. 89 of the Judicature Act, 1873, only applies in causes of action within the jurisdiction of the county court.

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I think, therefore, that the county court judge had no jurisdiction, and rightly refused to make any order in this action; and it follows that the decision of the King's Bench Division must be reversed. This is the judgment of the Court, and the appeal will be allowed with costs.

Appeal allowed.

Solicitors: *Churchman & Winser; Carter & Bell.*

H. B. H.

C. A. 1905 *Feb.* 3.

[IN THE COURT OF APPEAL.]

In re BUTTON. *Ex parte* VOSS.

Bankruptcy — Petitioning Creditor's Debt — Secured Creditor — Estimate of Security—Undervalue—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 2; *s.* 7, *sub-s.* 3.

Where a secured creditor presents a petition in bankruptcy and gives an estimate of his security, if the estimate is a genuine estimate, the Court will not inquire into its correctness, although the result of the inquiry might be to shew that the unsecured balance of the debt was not sufficient to support the petition; and, when the petitioning creditor comes in to prove in the bankruptcy, in the absence of evidence of mistake as to value he will not be allowed to depart from his estimate.

Whether he may amend his estimate upon proof of mistake, *quære.*

Ex parte Taylor, In re Lacey, (1884) 13 Q. B. D. 128, and *In re Vautin, Ex parte Saffery*, [1899] 2 Q. B. 549, discussed.

APPEAL by the debtor from a receiving order.

On March 31, 1904 the debtor gave to William Voss a promissory note for 300*l.* at four months for money lent, and he also charged certain leasehold premises in Bethnal Green in favour of Voss as security for the loan.

On October 7 Voss obtained judgment against the debtor on the promissory note for 300*l.* with interest and costs, and on November 4 he served a bankruptcy notice on the debtor for payment of the amount of the judgment debt.

On November 29, on the failure of the debtor to comply with this notice, Voss presented a bankruptcy petition against the debtor for 316*l.* 18*s.* 2*d.*, and he stated in the petition that he

held security for the debt and that he estimated the value of his security at 265*l.*, thus leaving a balance of 51*l.* odd unsecured. The debtor, in an affidavit filed in opposition to the petition, stated that the value of the security was not less than 600*l.*, and he asked for an adjournment in order that he might arrange a transfer of the security or satisfy the claim.

The petition first came on for hearing on December 20, and was then adjourned by consent until January 3, 1905, upon the terms of an agreement whereby the debtor agreed to pay Voss 50*l.* and the costs of his petition, and to pay or fully secure the debt of another creditor who had also filed a petition against the debtor and whose petition came on for hearing concurrently with Voss's petition; and by the same agreement the debtor admitted Voss's debt, and undertook not to oppose the petition on the adjourned hearing.

On the adjourned hearing on January 3, 1905, the debtor attempted to raise the question as to the sufficiency of the petitioning creditor's debt; but the registrar held that he was precluded from so doing by the order for adjournment, and he made a receiving order.

The debtor appealed.

Upon the appeal further affidavit evidence was adduced on both sides as to the value of the security.

The debtor's surveyors fixed the value of the security at from 480*l.* to 560*l.*, the petitioning creditor's surveyor at 250*l.*

Tindale Davis, for the debtor. 1. There is here no good petitioning creditor's debt, because if the security were properly valued it would be more than sufficient to cover the debt. There is nothing in s. 6, sub-s. 2, of the Bankruptcy Act, 1883, or in the Bankruptcy Rules, to bind a creditor to the valuation stated in his petition.

[VAUGHAN WILLIAMS L.J. Sect. 6 of the Act of 1869 contained a statement that the creditor should be bound by his estimate. Why that was left out in the corresponding section in the Act of 1883 I cannot imagine.]

In *Ex parte Taylor, In re Lacey* (1), the Divisional Court held that the estimate was binding; but it is submitted that that

(1) 13 Q. B. D. 123.

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case was wrongly decided, because Cave J. based his decision, in which A. L. Smith J. concurred, upon the erroneous assumption that the Bankruptcy Rules applied to the valuation in the petition, whereas they applied only to the valuation in the proof. This was pointed out by Wright J. in *In re Vautin, Ex parte Saffery* (1), which shews that where a debtor is adjudicated bankrupt on the petition of a secured creditor the trustee is not entitled to redeem the security at the amount of the petitioner's estimate in his petition. It follows from that that the petitioning creditor is not bound by his valuation, but may revalue his security when he comes in to prove, or may abstain from proving altogether. The result is that, unless the Court interferes, a secured petitioning creditor may obtain a receiving order by undervaluing his security, although his debt is fully secured, and may then decline to take any further proceedings in the bankruptcy. Therefore, where the estimate is not a proper estimate it is submitted that the Court ought to dismiss the petition under the words "other sufficient cause" in s. 7, sub-s. 3.

[*Frank Mellor*, for the petitioning creditor, objected that, having regard to the terms of the agreement embodied in the order for adjournment, it was not open to the debtor to dispute the validity of the debt.]

2. The agreement is not binding on the debtor, because the petitioning creditor was seeking thereby to obtain an unfair advantage to himself: *In re Otway* (2); and for that reason also this case falls within s. 7, sub-s. 3.

[Upon the first point *Moor* v. *Anglo-Italian Bank* (3), *Ex parte Vanderlinden, In re Pogose* (4), and *Couldery* v. *Bartrum* (5), were also referred to.]

Frank Mellor, for the petitioning creditor.

VAUGHAN WILLIAMS L.J. Upon the evidence it seems to me impossible to say that the creditor has not complied with the requirements of sub-s. 2 of s. 6 of the Bankruptcy Act, 1883, in the case of a petition by a secured creditor. In my

(1) [1899] 2 Q. B. 549.
(2) [1895] 1 Q. B. 812.
(3) (1879) 10 Ch. D. 681, 689.
(4) (1882) 20 Ch. D. 289.
(5) (1880) 19 Ch. D. 394.

opinion the creditor has complied with the provision as to the valuation of his security. He has given an estimate, and it is admitted that his estimate is such that it is not possible to say that it is a mere sham and not a substantial estimate. It has been urged upon us that the registrar should, when the petitioning creditor estimates his security, inquire whether the estimate is right. I think that the intention of the sub-section, which throws upon the creditor the duty of making the estimate, is to avoid the necessity of any such inquiry. It is said that this is not likely to have been the intention of the Legislature, because it would enable a malicious or unscrupulous petitioning creditor to make a fictitious estimate and undervalue his security, and obtain a receiving order upon that estimate, although in truth and in fact he was fully secured, or so much secured that the unsecured portion would not be sufficient to support a bankruptcy petition. The answer to that is that the petitioning creditor makes the estimate at his own risk; and if a bankruptcy occurs it is plain that, although the Bankruptcy Rules may not apply to that estimate when he comes in to prove, as was stated by Wright J. in *In re Vautin, Ex parte Saffery* (1)—and I am inclined to think that they do not apply—yet he is bound in this sense, that he cannot take any benefit in the administration in bankruptcy except on the basis of that estimate. I very much doubt whether he ought in any circumstances to be allowed to amend his valuation. It may be that he is not bound in the sense that the trustee is entitled to redeem the property at that valuation; but that is something which is not the act of the petitioning creditor. In my opinion, when one arrives at the conclusion that the estimate is real and not a sham, we ought not to go into the question what is the true value after the declaration of the estimated value.

There is a further point, as to whether the debtor in this case could go into the question whether the petitioning creditor has complied with the statute at all, because it was said he was excluded from so doing by the terms of the consent order. In my judgment the learned registrar, even though there is a consent order, ought always to be careful that a receiving order is not

(1) [1899] 2 Q. B. 549.

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made by virtue of that consent in such circumstances as would prejudice the other creditors. That is the ground of decision in those cases in which the Court has refused to make the order under the words "for other sufficient cause" in sub-s. 3 of s. 7.

It is said that the receiving order ought not to be made in this case, because the petitioning creditor by getting such an agreement as was embodied in the order for adjournment was really using the bankruptcy law for a purpose for which it was not intended. Any one with any experience of bankruptcy administration knows that a petitioning creditor constantly makes use of bankruptcy proceedings for the very purpose of extorting 20*s.* in the pound from the debtor, with the result that the other creditors may find themselves in a very disadvantageous position. Therefore we must look with some care, where an agreement is obtained as a condition of the adjournment of the petition, to see whether the petitioning creditor is obtaining for himself an advantage which he ought not to obtain, especially an advantage over other creditors; but though this is so, no one would say that every adjournment for the purpose of giving the debtor an opportunity of paying his debt is contrary to the intention of the bankruptcy law. But the Legislature and those who drafted the rules have taken effective means to prevent this abuse from frequently occurring, because by rule 169 of the Bankruptcy Rules, 1886 to 1890, after the expiration of one month from the day appointed for the first hearing of the petition, no further adjournment can take place except on certain specified grounds, or for some other sufficient reason to be stated in the order for adjournment. On the whole there is nothing in the present case to justify us in saying that the process in bankruptcy has been improperly used. The appeal will, therefore, be dismissed.

ROMER L.J. I am of the same opinion and for the same reasons, and I have nothing to add.

STIRLING L.J. I am of the same opinion and for the same reasons, and I only wish to add a few words on the important question which has been argued as to the effect of the estimate by the creditor in his petition of the value of his security. The

statute requires him, if he is a secured creditor, either to give up his security for the benefit of the creditors, or to give an estimate of the value of his security. It is said that if the petitioning creditor takes the latter course and gives an estimate in his petition of the value of his security, he is not bound by it, but may, when he comes in to prove his debt, prove on the footing of a different valuation. I cannot agree. If he states that he is willing to give up his security for the benefit of the creditors if the debtor is adjudged bankrupt, he is not allowed to prove unless he gives up his security; and if he gives an estimate, it would be most unjust without evidence of mistake to allow him to depart from that estimate and to prove on a different footing. I think that in the absence of mistake he ought to be held bound by his estimate for the purposes of the bankruptcy proceedings. It is in that sense that I understand the decision in *Ex parte Taylor, In re Lacey.* (1) I should be slow to depart from that decision given twenty years ago by two very eminent judges, Cave and A. L. Smith JJ., of whom the former had a special knowledge of the bankruptcy law. But I see that a difficulty may arise, as was pointed out by Wright J. in *In re Vautin, Ex parte Saffery.* (2) Suppose a petitioning creditor, after getting an adjudication, chooses to abstain from taking any further benefit in the bankruptcy, and sits on his security. I have great difficulty in seeing how his estimate in that case is to be enforced against him. I see the difficulty that presented itself to Wright J., and I feel the force of his observation that the Act contains no provision to meet that case; but justice requires that a creditor who comes in to prove shall be bound by his estimate. I wish to reserve consideration of the question whether he is entitled to alter his estimate if he proves that it has been made under a mistake as to the value. Wright J. has decided it, but I prefer to reserve consideration of that question until it arises. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *M. Edward Williams & Co.; R. Voss & Son.*

(1) 13 Q. B. D. 128.

(2) [1899] 2 Q. B. 549.

H. B. H.

C. A.
1905
Feb. 24.

[IN THE COURT OF APPEAL.]

FROST *v.* THE AYLESBURY DAIRY COMPANY, LIMITED.

Sale of Goods—Purpose for which Goods required—Reliance on Seller's Skill —Milk supplied for Consumption—Implied Warranty of Fitness—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-s.* 1.

By s. 14, sub-s. 1, of the Sale of Goods Act, 1893, it is enacted that—"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply . . . . there is an implied condition that the goods shall be reasonably fit for such purpose."

The defendants, who were milk dealers, supplied the plaintiff with milk which was consumed by himself and his family. A book in which the daily supply was entered was interleaved with a printed notice of the precautions taken by the defendants to supply milk, pure and unadulterated and free from the germs of disease. The milk supplied contained germs of typhoid fever, and the plaintiff's wife was infected thereby and died. The existence of the germs could only be discovered by prolonged investigation. In an action, upon an implied warranty under s. 14, sub-s. 1, of the Sale of Goods Act, 1893, to recover the expenses to which the plaintiff had been put by the illness and death of his wife :—

Held, that the purpose for which the milk was supplied was sufficiently made known to the sellers by its description, that there was evidence that the buyer relied on the seller's skill, and that there was an implied condition under the Act that the milk was reasonably fit for consumption, although the defect was not discoverable at the time of the sale.

Application for a new trial or that judgment should be entered for the defendants in an action tried before Grantham J. with a jury.

The action was brought to recover damages for breach of warranty in respect of milk purchased by the plaintiff from the defendant company. The case for the plaintiff was that the defendants carried on business as vendors of milk, and that they supplied and sold milk to the plaintiff for consumption by himself, his wife, and family on the terms that the defendants should take certain precautions to insure that only pure milk,

free from all germs of disease and from adulteration, was supplied. The terms were stated to be contained in a pass-book supplied by the defendants to the plaintiff, and certain of the terms were set out in the statement of claim; and it was alleged that during the month of July, 1903, and the months immediately preceding the defendants did not comply with the terms in certain respects that were set out, and that in the month of July, 1903, the milk supplied was not free from germs of disease, but was infected with the germs of typhoid fever, and was not reasonably fit for the purpose for which it was required, nor of merchantable quality. It was further alleged that the plaintiff's wife contracted typhoid fever, the infection being communicated to her by the milk supplied by the defendants, and that she died of the fever. The plaintiff claimed damages in respect of the loss and expense to which he had been put by the illness and death of his wife. The defendants denied that they supplied milk on the terms alleged, and asserted that if they did supply milk upon those terms they had not failed to comply with them, and they denied the allegations that the milk was affected with germs of typhoid fever and that typhoid fever was communicated to the plaintiff's wife by any milk supplied by them. They also denied that they were liable under the Sale of Goods Act, 1893, or at common law.

The jury found that the milk was the cause of the fever and returned a verdict for the plaintiff, for whom judgment was entered.

The principal ground of appeal was that the defendants were not liable under the provisions of the Sale of Goods Act, 1893, or at common law, and that there was no warranty or condition by the defendants that the milk was reasonably fit for the purpose for which it was supplied, or of merchantable quality or free from the germs of typhoid. Other grounds of appeal were that the verdict was against the weight of the evidence and misdirection. Upon the first of these grounds the Court came to the conclusion that there was abundant evidence to support the finding of the jury, and upon the second that the misdirection (if any) had not affected the

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result of the case. Further reference to these points is omitted from the arguments and the judgments.

The defendants appealed.

Macmorran, K.C., and *W. Mackenzie*, for the defendants. Admitting that from the nature of the goods supplied there is an implication that the milk is wanted for consumption, that particular purpose must be made known in such a way as to shew that the buyer relies on the seller's skill or judgment. It might well be that reliance would be placed on the seller's skill where the demand is for particular milk supplied by the defendants, such as peptonized or sterilized milk, or possibly on a demand for selected milk or milk suitable for an invalid, and in such cases the section might apply. A mere demand to be supplied with milk not of any special quality or description does not contain any element that can be said to shew that the buyer relies on the seller's skill or knowledge. To hold otherwise would be to give no effect to the limitation in the section, and to make it applicable universally on every transaction of sale and purchase. There is a further objection in that it was shewn by evidence given in the course of the trial that the typhoid germ is only discoverable by a bacteriological examination to ascertain if the bacillus exists. This is a process that would take a considerable time, while the milk is required for immediate consumption. The existence of the germs being undiscoverable before the sale of the milk, no skill or judgment of the seller would avail anything, and if so it cannot be that the buyer relies on that which cannot be applied to the subject-matter of the sale. No doubt the fact that a defect is latent is no bar to the application of the section, but it has never been held that a defect that is undiscoverable makes the seller liable on an implied warranty, and it is submitted that the terms of the section do not warrant such a conclusion.

[Reference was made in the course of the argument to *Randall* v. *Newson* (1); *Wallis* v. *Russell* (2); *Wren* v. *Holt* (3); *Preist* v. *Last*. (4)]

(1) (1877) 2 Q. B. D. 102.
(2) [1902] 2 I. R. 585.
(3) [1903] 1 K. B. 610.
(4) [1903] 2 K. B. 148.

Duke, K.C., and *Holman Gregory*, for the plaintiff, were not called on to argue.

COLLINS M.R. This is an appeal by the defendants in an action in which the plaintiff sued to recover expenses to which he was put by the illness and death of his wife, caused, as he alleged, by typhoid fever of which the infection was caught from milk supplied by the defendants. The jury found that the milk was the cause of the fever, and gave a verdict for the plaintiff, for whom judgment was entered. The first point taken is whether in point of law, on the facts as ascertained, there can be any liability on the defendants even if it is admitted that the milk was the cause of the fever, and on this it is contended for the defendants that there was no actionable wrong on their part. The point is whether the circumstances under which the milk was bought bring the case within the provisions of s. 14, sub-s. 1, of the Sale of Goods Act, 1893. That section provides that, "subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1.) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose." It was admitted that the milk was bought by the plaintiff from the defendants, and that it fell within the category "goods of a description which it was in the course of the seller's business to supply," but it was said that the buyer had not made known to the seller the particular purpose for which the goods were required so as to shew that he relied on the seller's skill or judgment. Considering the matter by steps, it appears that there was no specific evidence as to the inception of the relation of buyer and seller, because, as a matter of fact, people do not, when they want a milk supply,

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enter into an elaborate negotiation with the vendor of the milk. We begin the discussion with the practice followed in the dealing between the parties. The fact of the supply of the article involves a contract. That contract is for the supply of food, for no one would question that the milk was bought as an article of consumption. It would be quite unnecessary to call evidence on that point, for it would be reasonably assumed by every one, and the jury might fairly arrive at the conclusion that the milk was bought for the purpose of being consumed by the family. The question then arises whether that was made known to the seller "so as to shew that the buyer relied on the seller's skill or judgment." If any seller ever did inform a buyer of his special skill or knowledge as a vendor the defendants have done so. The book which has been called a pass-book, and which contains entries as to the delivery of the milk, is interleaved with laudatory comments on the defendants' skill and diligence and special knowledge in the matter of milk, so that the buyer could not pass over their view of their special skill. It contains paragraphs headed, "Milk in relation to tuberculosis and other diseases," and states the precautions taken to insure that only pure milk free from all germs of disease should be supplied. There are paragraphs relating to "medical inspection," describing the precautions taken, to "milk analysis," with information as to how the analyses are taken, and to "bacteriological inspection," and to the supervision of a veterinary surgeon. The customer could not escape being permeated with the idea that he was being secured against the possibility of any possible mischief arising if he bought the defendants' milk. We arrive then at this result, that milk was supplied for a purpose known to the sellers under circumstances which shewed that the buyer relied on the sellers' skill or knowledge, and that the goods were of a description which it was in the course of the sellers' business to supply. The point mainly pressed upon us on behalf of the defendants was that the buyer could not be said to rely on the skill or judgment of the sellers in a case in which no amount of skill or judgment would enable them to find out the defect in the milk supplied. That amounts to a

contention that a seller of goods cannot be answerable for a latent defect in them unless upon a special contract to that effect. That argument is not employed for the first time, for it was used before the Sale of Goods Act, 1893, which consolidated and crystallized the law, which seems to me to be just the same under the statute as it was under the common law. The matter was specifically dealt with in the considered judgment of the Court of Appeal in *Randall* v. *Newson* (1), where it was held that on the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and that there is no exception as to latent undiscoverable defects. That was the case of a defective pole for a carriage, and the view of the Court is expressed thus (2): "If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation." The suggested limitation was that the principle applied only to such defects as could be discovered by reasonable care and skill. The judgment continues: "If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable." That appears to me to be a conclusive authority on that part of the case raised on behalf of the defendants. I may, however, refer also to a matter that was dealt with in the judgment of this Court in *Preist* v. *Last* (3), that a good deal of difficulty and some confusion may arise as to whether an article is sold for a particular purpose where it is capable of being used for a number of purposes. Where the thing dealt with carries in

(1) 2 Q. B. D. 102. (2) 2 Q. B. D. at p. 109.
(3) [1903] 2 K. B. 148.

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its description a limitation to a particular purpose the difficulty does not arise. In this case we begin with the purchase of milk, a commodity which carries with it a special limitation to the purpose of food. It is obvious that the obligation of the seller of food must stand in a different position from that of the seller of an article that may or may not, according to the special circumstances of the case, be used for a particular object. All the difficulty is gone when once we get in the description of the article itself the purpose for which it is to be used. That principle was applied in the case to which I have referred, which was that of the purchase of a hot-water bottle, a description which carries with it the purpose for which the article is bought. The same principle applies in this case, where it is clear that the milk was bought for a special purpose, and sold by persons who claimed and received the confidence of the purchaser in the special skill and knowledge asserted by the sellers. It seems to me to be clear that there is no legal difficulty in upholding this verdict, and that the appeal should be dismissed.

MATHEW L.J. I am of the same opinion. The construction of s. 14 of the Sale of Goods Act, 1893, appears to me with reference to this case to be free from difficulty. The provision of sub-s. 1 is, "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required." Stopping there, it is said, and in my opinion correctly said, on behalf of the plaintiff, that the particular purpose for which the milk was required was conveyed by implication. It was to be used in the ordinary way for the purpose of consumption, and was supplied for that purpose, and there seems to me to be no doubt that the purpose for which the purchase was made was conveyed by implication to the seller. The section continues with the words, "so as to shew that the buyer relies on the seller's skill or judgment"; the word "skill" is sufficient for the purpose of this case. In the ordinary course milk is supplied without any inspection. It is delivered by the seller at the buyer's house, and there is no suggestion that any judgment can be

exercised by the buyer in respect of it. Every effort was made on the part of the sellers to give an assurance to the buyer that their skill could be relied on, and they pointed out all the precautions which they take to secure that the article shall be free from adulteration or contamination. It seems to me, under these circumstances, that the terms of the section are applicable to this case and dispose of the point of law in favour of the plaintiff.

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COZENS-HARDY L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Skipper & Tucker.*
Solicitors for defendants: *Wilkinson, Raikes & Son.*

A. M.

GLASBROOK *v.* DAVID & VAUX.

1905 *Feb.* 15.

Sheriff—Fees—Possession Money—Several Warrants against same Debtor—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55), *s.* 20—*Order of August* 31, 1888, *as to Fees.*

Where a sheriff has put a man in possession of goods under a writ of fi. fa. issued by one creditor, and afterwards received other writs against the same debtor from other creditors, and has merely kept the same man in possession on behalf of all the creditors, he cannot, upon the executions being withdrawn, recover possession money at 5*s.* a day from more than one creditor.

Though called a fee, possession money under the Sheriffs Act, 1887, is only intended to cover the sheriff's out of pocket expenses.

THIS was an action brought by the sheriff of Glamorgan for 22*l.* 13*s.*, the amount of his charges for an execution issued by the defendants in an action of *David & Vaux* v. *Lochner & Brande* which had been levied by the sheriff, but afterwards withdrawn at the request of the defendants. The amount of the plaintiff's charges had been taxed by the taxing master at the sum claimed. The defendants admitted that they were liable to pay the proper charges of the plaintiff, but contended

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that 19*l.* of the charge allowed by the taxing master was for possession money, which the plaintiff had no right to charge.

The defendants had lodged their writ of fi. fa. for 117*l.* 8*s.* 10*d.* and costs with the plaintiff for execution on December 18, 1903.

Two writs had previously been lodged with the plaintiff for execution against the same debtors. He had taken possession of the execution debtors' goods under the writs, and with their consent had remained in possession until after the defendants' writ was lodged with him. Four other writs of fi. fa. against the execution debtors were lodged with the sheriff at subsequent dates, of which the latest was February 9, 1904. The sheriff, by the consent of all parties, continued in possession of the goods seized as aforesaid until March 8, 1904. He only had one man in possession all the time.

On March 8, 1904, the sheriff received notice that the official receiver had by an order in bankruptcy been appointed interim receiver of the property of the execution debtors. The defendants thereupon instructed the sheriff to withdraw. The other execution creditors gave no instructions, and in each case interpleader proceedings were taken out, with the result that the sheriff was ordered to withdraw, and the execution creditor in each case was ordered to pay the sheriff's costs and charges. The sheriff's bills of costs were taxed, and in each case he was allowed possession money at the rate of 5*s.* a day; the total amount so allowed was 110*l.*, and the sheriff had actually been paid in four cases sums amounting to 80*l.* 5*s.* In the other two cases the execution creditors were bankrupt, and the sheriff had not received his costs.

For the purpose of the trial of this action the parties had admitted the facts above stated, and had made an admission in the following words: "That the plaintiff did not put into possession a man under the defendants' execution, but kept possession by means of the man actually in possession at the date of lodging of the defendants' writ with the plaintiff, and the plaintiff did not by reason of the defendants' said execution incur any further liability for expense to, or make any payment to, the man in possession beyond what he would have paid had the defendants' said writ not been lodged with the plaintiff."

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Bailhache, for the plaintiff. The plaintiff is the sheriff of Glamorgan, and claims against the defendants the costs and charges of an execution levied at their instance and withdrawn by them. The amount has been settled by the taxing master. The taxation cannot be reviewed in the ordinary way: *Townend* v. *Sheriff of Yorkshire* (1); but the same case prevents the plaintiff from contending that the defendants cannot come here and shew reasons why they are not bound to pay. But there is a primâ facie case in the sheriff's favour, and the defendants must displace it.

J. R. Atkin, for the defendants. The claim of the sheriff is to remuneration by means of double possession money, which is unheard of. At common law the sheriff had no right to remuneration at all. By the statute of 29 Eliz. c. 4, a scale of poundage was fixed which is still in force, by way of remuneration. But this could only be recovered out of the moneys realized. In *Bilke* v. *Havelock* (2) Lord Ellenborough makes some strong remarks on a sheriff's claim for costs incurred for ineffectual proceedings. The Sheriffs' Fees Act, 1837 (1 Vict. c. 55), for the first time gave a right to possession money. That Act fixed a scale of expenses which is still in force in the case of the execution of all writs except fi. fa. It fixes a different scale of possession money according to whether the man in possession has his board or not, which shews that it was intended only to cover out of pocket expenses. These expenses would, however, still only be recovered out of proceeds of a successful execution.

The Sheriffs Act, 1887 (50 & 51 Vict. c. 55), consolidated the law as to sheriffs, and provided for rules being settled as to fees. The only rules issued are those as to executions under writs of fi. fa., set out in the Annual Practice, vol. ii. pp. 266, 267. These rules for the first time enabled the sheriff to recover fees for seizure, mileage, and possession from the execution creditor where the execution was withdrawn or produced nothing. The wording of the rules shews that these fees are only intended to cover expenses. It has been decided that double fees cannot be charged for seizure or mileage: *In re*

(1) (1890) 24 Q. B. D. 621. (2) (1813) 3 Camp. 374; 14 R. R. 758.

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Wells, Ex parte Sheriff of Kent. (1) Both these charges were claimed in this case and disallowed. Possession under one writ enures for the benefit of the others: *Jones* v. *Atherton.* (2) The general principle is that the sheriff should not be paid twice for the same work: *Sneary* v. *Abdy.* (3) In *Ex parte Sims, In re Grubb* (4), these charges are called incidental expenses.

Clode, amicus curiæ, referred to *In re Morgan, Ex parte Board of Trade.* (5)

Bailhache, in reply. As a matter of fact, separate quantities of goods were seized for and allotted to each execution creditor.

[FARWELL J. After the admissions, that is not open to you in reply.]

On the general law there is no direct decision, but this case shews the general opinion as to the practice. The charge was allowed, not only by the taxing master in this case, but by the taxing masters in all the interpleader proceedings. Where the rules mean that only the actual moneys expended should be paid, they say so—e.g. (5.) For removal of goods or animals, "the actual cost"; (6.) For advertising, &c., "the sum actually and necessarily paid."

The rule (4.) as to possession money is quite different: it fixes a definite sum to be paid to the sheriff in all cases. The second execution creditor gets the benefit of the possession, and, if the defendants' contention is correct, they are under no liability to pay for it, even if the sheriff can get nothing from the first creditor.

FARWELL J. I am obliged to the learned counsel on both sides for the assistance they have given me.

The question, to my mind, turns simply upon the construction of the rules under the Sheriffs Act, 1887. The last clause of the rule provides that, "In every case where an execution is withdrawn, satisfied, or stopped, the fees under

(1) (1893) 68 L. T. (N.S.) 231.
(2) (1816) 7 Taunt. 56; 17 R. R. 442.
(3) (1876) 1 Ex. D. 299, 304.
(4) (1877) 5 Ch. D. 375.
(5) [1904] 1 K. B. 68.

this order shall be paid by the person issuing the execution": that is this case. The sheriff seized, and for the purpose of my decision I assume that he seized all the goods once for all. I think that is the fair meaning of the admissions, and I think that is the point the parties have come here to try. There were seven levies altogether, and, the goods having been once seized, there could be no subsequent seizure. The intention of the Act of 1887 was no doubt to enable the sheriff to recover the poundage and his expenses. Although the Act of Parliament uses the word "fees," and, of course, the rule follows it, when you come to look at the details they are the actual expenses: first, of making inquiries; secondly, of seizure; thirdly, of mileage; fourthly, of the man in possession.

The sheriff claims to have payment for the same man in possession from each of the judgment creditors. The result would be that the sheriff would get a very large sum (I am told 120*l.*) as possession money. I do not think that can be the true meaning of these rules. I think the proper view is that the sheriff was entitled to have his poundage, and, in addition to that, these fees, which are actual out of pocket expenses, and all of which stand on the same footing.

It has been held that there can be only one fee for seizure and one for mileage. If there can be only one seizure, and one journey to make a seizure, the possession also, so long as there is only one man in possession, must, it seems to me, be treated as a single possession. And I come to that conclusion the more readily because the rule provides that the man is in every case to provide his own board. That looks as if this 5*s.* a day is meant to keep the sheriff from being out of pocket. In *Ex parte Sims* (1) James L.J. treats possession as being one of the incidental expenses that the Act intended to provide for; and I think this case is indistinguishable in principle from the decision of Vaughan Williams J.: *In re Wells, Ex parte Sheriff of Kent.* (2)

I am unable to see any ground for distinguishing between seizure, mileage, and possession. The three really hold

(1) 5 Ch. D. 375.

(2) (1893) 68 L. T. (N.S.) 231.

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together, and I think Wright J. in *In re Morgan* (1) took that same view.

The result is that, whatever may be the liability of the various judgment creditors to the sheriff so long as he remains unpaid—and as to that liability I say nothing—when he has been paid in respect of seizure and mileage and possession by one creditor he cannot recover the same sum from any of the others.

Judgment for defendants.

Solicitors: *Helder, Roberts & Co., for Hartland, Isaac, Watkins & Co., Swansea; McKenna & Co.*

J. R. B.

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[IN THE COURT OF APPEAL.]

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Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*Limitation of Time for bringing Action—Highway—Repair—"Extraordinary Traffic"—"Extraordinary Expenses"—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1.

Sect. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, provides that proceedings by a highway authority for the recovery of the extraordinary expenses incurred by them in repairing a highway by reason of extraordinary traffic thereon "shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work."

Held, that, notwithstanding this limitation of twelve months, an action against a public authority, in respect of damage to a highway caused by them "in pursuance or execution of any Act of Parliament, or of any public duty or authority," must be brought within the six months limited by s. 1 of the Public Authorities Protection Act, 1893.

But, if the act which causes the damage to the highway is done by an independent contractor employed by a public authority in pursuance of his contract with them, he not being their servant or agent, the limit of six months fixed by s. 1 of the Public Authorities Protection Act, 1893, has no application. In such a case an action in respect of the

(1) [1904] 1 K. B. 68.

damage can be brought against the public authority under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898, as persons "in consequence of whose order" the damage has been done, and the time within which the action must be brought is that which is fixed by s. 12, sub-s. 1 (*b*).

The effect of the latter part of sub-s. 1 (*b*) of s. 12 is, "where the damage is the consequence of any particular building contract or work extending over a long period," to give a period of "six months after the completion of the contract or work," in addition to the twelve months fixed by the prior part of sub-s. 1 (*b*), within which the action may be brought.

A corporation, in carrying out a scheme for the widening of one of their roads, entered into a contract with a contractor for the hauling of stone. The contractor used traction engines to haul the stone, and in so doing caused damage to some other roads which were repairable by the county council as the highway authority. The contract was for a year, commencing on April 1, 1902, and terminating on March 31, 1903. The damage to the roads took place between January 19 and March 24, 1903. The work of widening the road was completed in September, 1903. On February 11, 1904, the county council commenced an action against the corporation to recover the additional expenses of repairing the plaintiffs' roads in consequence of the use of the traction engines:—

Held, that the action could be maintained against the corporation as the persons "in consequence of whose order" the damage had been done:

But, *held*, that the limit of six months for bringing the action fixed by s. 1 of the Public Authorities Protection Act, 1893, did not apply, because, the contractor not being the servant or agent of the corporation, the act was not done by them, and it was done by him in performance of his private obligations under his contract, and not in pursuance or execution of any public duty or authority:

Held, therefore, that the time within which the action must be brought was that fixed by s. 12, sub-s. 1 (*b*), of the Act of 1898:

Held, also, that the hauling of the stone was a distinct work from the widening of the road, and that the plaintiffs could only recover in respect of the damage done since February 11, 1903, i.e., within twelve months from the issue of the writ in the action.

Judgment of Darling J. reversed.

APPEAL by the plaintiffs from the judgment of Darling J.

The plaintiffs, as the highway authority liable to repair certain main roads in several parishes, in the county of Kent, in the neighbourhood of Folkestone, brought the action to recover from the defendants the extraordinary expenses, amounting to 520*l.* 8*s.* 10*d.*, incurred by the plaintiffs in repairing those main roads, "by reason of the damage caused by excessive weight passing along the same and extraordinary

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traffic thereon conducted by or in consequence of the order of the defendants."

The defendants had been engaged in widening a road, called the Folkestone and Cheriton Road, situate within the borough of Folkestone. This work was commenced in December, 1902, and was not completed until September, 1903. For the purposes of the work the defendants entered into a contract with Messrs. W. Lancefield & Son for the haulage of stone. The contract commenced on April 1, 1902, and terminated on March 31, 1903. The damage done to the roads was caused by traction engines employed by the contractors for the haulage. Some of the stone hauled was used by the defendants for the ordinary repairs of their roads. The damage complained of was done between January 19 and March 24, 1903.

On January 4, 1904, the plaintiffs' surveyor gave a certificate of the cost of the extraordinary repairs of the road. The plaintiffs demanded payment from the defendants, which they refused, and the action was then commenced.

The writ was issued on February 11, 1904.

The defendants, among other defences, said that the haulage of stone by the contractors was completed more than six months before the commencement of the action, and that if any damage was thereby done to the plaintiffs' roads it was done more than twelve months before the commencement of the action, and that the plaintiffs' right of action was therefore barred by the Public Authorities Protection Act, 1893, s. 1 (*a*), and the Locomotives Act, 1898, s. 12, sub-s. 1 (*b*), or one of them.

At the trial of the action Darling J. assessed the damages at 300*l*., of which 250*l*. was in respect of injury to the roads before, and 50*l*. in respect of injury after, February 11, 1903. The points of law were reserved for further consideration. On the argument of the points of law Darling J. held that the limitation of six months imposed by the Act of 1893 had not been repealed by the Act of 1898, and that the defendants were entitled to the protection given by the former Act, and, as the action had not been commenced within six months after the

damage had been done, the learned judge gave judgment for the defendants, with costs. In so doing Darling J. followed his own previous decision in *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1), with which Bigham J. agreed.

The plaintiffs appealed.

Dickens, K.C., and *Theobald Mathew*, for the plaintiffs. There is nothing illegal in bringing extraordinary traffic upon a highway, but the person who brings it has to pay the additional expense of repairing the road which is caused by the extraordinary traffic, as shewn by the certificate of the surveyor of the highway authority: s. 23 of the Highways and Locomotives (Amendment) Act, 1878. That Act does not impose any limit of time within which proceedings to recover the expenses must be taken. But s. 1 of the Public Authorities Protection Act, 1893 (2), prescribes a limit of six months within

(1) [1900] 2 Q. B. 454.

(2) By the Public Authorities Protection Act, 1893, s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect (inter alia):—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

By s. 23 of the Highways and Locomotives (Amendment) Act, 1878, "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

By s. 12 of the Locomotives Act, 1898, "(1.) Sect. 23 of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows:—

"(*a*) Expenses under that section

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which actions must be brought "against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority." In the present case there is no default except in the non-payment of a sum of money, and that default was committed within six months before the writ in the action. Then s. 12 of the Locomotives Act, 1898, by sub-s. 1 (*b*) prescribes a limit of twelve months within which proceedings for the recovery of expenses of extraordinary traffic must be commenced. It would be somewhat anomalous if the limit were six months in the case of an action against a public authority and twelve months in the case of an action for the same expenses against their contractor, the owner of the traction engine which caused the injury.

It is submitted that the Act of 1893 does not apply to the present case. The act which damaged the roads was not done "in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority." The hauling of stone was not done by the defendants as a municipal corporation. They were not carrying the stone in execution of any Act, and there was no public duty or obligation to carry it along these particular roads.

[STIRLING L.J. They were acting in execution of their duty as the highway authority.]

It was merely an act indirectly concerned with their public duty or authority: *Ambler* v. *Bradford Corporation*. (1) The Act of 1898 did not create a new wrong. It only altered the

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shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court.

"(*b*) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work.

"(*c*) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

(1) [1902] 2 Ch. 585, 594.

class of persons liable by adding to the words "by whose order" the words "or in consequence of."

Under the Act of 1893 it is submitted the six months run from the time when the default in payment was made, not from the time when the damage was done: *Milford Docks Co.* v. *Milford Haven Urban District Council.* (1) The cases on which Darling J. relied, such as *Parker* v. *London County Council* (2), were cases of tort. Assuming that this case would have fallen within the Act of 1893, yet the Act of 1878 deals with all classes of persons who bring extraordinary traffic upon a highway, and as the amending Act of 1898 prescribes as regards all those persons a limit of twelve months within which proceedings may be taken for the recovery of expenses caused by extraordinary traffic, the limitation fixed by that Act must alone be regarded. As regards proceedings for that purpose a special code is provided, and it must be taken that as regards such proceedings the limitation of six months imposed by the Act of 1893 has been repealed or superseded.

[VAUGHAN WILLIAMS L.J. referred to *Sharpington* v. *Fulham Board of Guardians.* (3)]

As to what constitutes "extraordinary traffic," see *Hill* v. *Thomas.* (4)

[*Hume-Williams, K.C.*, for the defendants. The cause of action is the damage done by the extraordinary traffic; the surveyor's certificate of the cost of repairs is only a condition precedent to the bringing of the action.]

Assuming that the Act of 1903 does not apply, then it is submitted that the plaintiffs are entitled to recover the 300*l.*, which the learned judge assessed as the total amount of the damage. The hauling of the stone formed part of the work of widening the defendants' road, and the damage was "the consequence of . . . . work extending over a long period," and the limitation is, therefore, under s. 12, sub-s. 1 (*b*), of the Act of 1898, "six months after the completion of the work." "Work extending over a long period" must mean something analogous to a "building contract" which extends over a long period, in

(1) (1901) 65 J. P. 483.
(2) [1904] 2 K. B. 501.
(3) (1904) 20 Times L. R. 643.
(4) [1893] 2 Q. B. 333, 341.

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which case the six months would run from the completion of the contract. So here the six months must run from the completion of the work of widening. The reason for the amendment of s. 23 of the Act of 1878, by introducing the words "or in consequence of," was to meet the decision in *Lord Gerard* v. *Kent County Council* (1), in which it was held that a person in consequence of whose order a highway was injured by extraordinary traffic was not a person "by whose order" the injury was done within the meaning of s. 23 of the Act of 1878.

[VAUGHAN WILLIAMS L.J. An alternative right is given to sue either the person *by* whose order the damage was done, or the person *in consequence of* whose order it was done.]

It is submitted that the Legislature intended that twelve months should be the limit as regards the person *by* whose order the damage was done, and that six months from the completion of the work should be the limit as regards the person *in consequence of* whose order the damage was done. On the other construction a difficulty would arise if there were a number of independent contractors; there might be a different limit of time as regarded each of them.

It must be admitted that *Epsom Urban District Council* v. *London County Council* (2) is an authority against this contention; but in that case the point was scarcely argued.

Hume-Williams, *K.C.*, and *Hansell*, for the corporation. It is submitted that s. 1 of the Act of 1893 applies. That section refers to two kinds of action: (1.) actions "for any act done in pursuance or execution of any Act of Parliament, or of any public duty or authority"; (2.) actions "in respect of any alleged neglect or default in the execution of any such Act, duty, or authority."

[VAUGHAN WILLIAMS L.J. Commission and omission.]

It cannot be properly said that the non-payment of a sum of money demanded is a default in the execution of a public duty. There must be something in the nature of negligence. And here the learned judge has reduced the amount demanded. There is no default in not paying an excessive demand.

(1) [1897] 1 Q. B. 351; [1897] A. C. 633. (2) [1900] 2 Q. B. 751.

But it is submitted that the widening of the road and the hauling of stone for that purpose were clearly acts done in pursuance or execution of a public duty. It is the duty of the corporation to keep their roads in a proper condition for traffic. The cause of action against the corporation is the injury to the plaintiffs' roads, and the measure of damage is the amount of the extra expense of repairing the plaintiffs' roads due to the extraordinary traffic: *Hill* v. *Thomas*. (1)

[ROMER L.J. The contractor was not the servant of the corporation; his acts were not done in pursuance of a public duty. How can his acts be the acts of the corporation within the meaning of the Act of 1893?]

A corporation could not themselves haul the stone; they must employ some one to do the work. Can it make any difference whether they employ one of their servants to haul the stone, or whether they enter into a contract for the purpose?—*Midland Ry. Co.* v. *Withington Local Board*. (2) Unless the act complained of was done by the corporation, there is no cause of action against them.

[ROMER L.J. Can it be said that the order given by the contractor was an act done by the corporation in execution of their duty?]

It is submitted that it can. How can the plaintiffs, who seek to make the corporation liable for an act as being their act, say that for the purposes of the Act of 1893 it is not their act? The Act of 1898 enables the corporation to be sued for an act which is done by another person; it must therefore be their act within the meaning of the Act of 1893. It would be a dangerous thing to say that whenever a corporation enter into a contract for the doing of work which it is their duty to do they lose the protection given by the Act of 1893, which they would have if they did the work themselves.

[VAUGHAN WILLIAMS L.J. They would not need the protection if the act was not theirs.]

At any rate, the act of which the plaintiffs complain is an act of the corporation, and therefore they are entitled to the protection.

(1) [1893] 2 Q. B. 333, 340. (2) (1883) 11 Q. B. D. 788.

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As regards s. 12 of the Act of 1898, if there had been two contracts for the hauling of the stone which had injured the plaintiffs' roads, it might have been reasonable that the time should run from the completion of the whole work. But here there was one contract which lasted for a year for the hauling of stone. That was the work which caused the damage; no damage was done by anything else during the work of widening the road. Therefore the limit of time is six months from the completion of the contract, and the action is brought too late. But if the limit is twelve months, the time must run from the date of the last injury done in the work of hauling, i.e., from February 11, 1903.

Epsom Urban District Council v. *London County Council* is more fully reported in 64 J. P. 726, and that report shews that there were more contracts than are mentioned in [1900] 2 Q. B. 751. The object of s. 12 of the Act of 1898 was not only to amend s. 23 of the Act of 1878, in order to meet the decision in *Lord Gerard* v. *Kent County Council* (1), but also to alter the nature of the remedy, and to fix a limit of time within which an action must be commenced. Formerly there was no limit of time except under Jervis' Act. As to what is "extraordinary traffic," see *Whitebread* v. *Sevenoaks Highway Board*. (2)

Theobald Mathew, in reply.

VAUGHAN WILLIAMS L.J. I agree entirely with much of the judgment of Darling J. I agree with him that the Public Authorities Protection Act, 1893, is not repealed as regards public authorities by the Locomotives Act, 1898, and that the introduction in these two Acts respectively of different periods of limitation does not cause the two Acts in any way to conflict. The fact that with regard to the general public one period of limitation is fixed, and that with regard to members of that special class whom the Legislature have thought fit specially to protect a different and a shorter period of limitation has been fixed, does not bring the two Acts into conflict. Of course, when Darling J. had once decided the case upon the

(1) [1897] 1 Q. B. 351; [1897] A. C. 633. (2) [1892] 1 Q. B. 8.

ground that the Act of 1893 applied, it was not necessary that he should pronounce a judgment on any other point, and I need not consider his judgment with reference to any other matters. But with reference to this particular point, upon which Darling J. really disposed of the action, I cannot agree with him, because, in my judgment, the Public Authorities Protection Act, 1893, has no application to this action, and for this reason, that the contractor who did the injury to the roads was in no sense the servant or agent of the local authority, the Folkestone Corporation. Under these circumstances, if the Act of 1878 had stood unaltered, it is plain that no proceedings whatsoever could have been taken against the defendants for the damage which was done to these roads, because it was not done by their order. They require no protection, because the act which was done was not done by them or by their servants. Therefore, in my judgment, we have nothing to do with the Public Authorities Protection Act, 1893.

This being so, we must deal with the points which were not discussed by Darling J. at all. The question really is, What is the date from which the statutory limitation of time will run? When we look at the Act of 1898 we find that by s. 12 various amendments are made of s. 23 of the Highways and Locomotives (Amendment) Act, 1878. The remedy under that Act was by summary proceedings before magistrates, and the sole object of those proceedings was the recovery of expenditure incurred by the highway authority. Sect. 12 of the Act of 1898 amends s. 23 of the Act of 1878. The first alteration which I will notice is that made by clause (*c*) of sub-s. 1 of s. 12, which says that "there shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'" The circumstances under which the remedy can be applied are altered. The remedy is altered from a proceeding in a Court of summary jurisdiction to an action in the High Court or the county court, and it is really an action to recover damages for the injury done to the road, and not merely to recover a certain amount of expenditure. It is quite true that the certificate of the surveyor as to the amount of the expenditure is a condition precedent to the recovering of a verdict or

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Vaughan Williams L.J.

judgment in the action; but nevertheless it is plain that not only is the Court altered, but the remedy which can be obtained by legal proceedings is altered also.

That being so, I will proceed to examine the other clauses of sub-s. 1 of s. 12. [The Lord Justice read sub-s. 1 (*a*) and (*b*), and continued:—]

I will first deal with the meaning of the words "work extending over a long period" in clause (*b*). I cannot accept Mr. Mathew's view that those words entitle the present plaintiffs to say that the statutory limitation of time did not begin to run until the end of all the works comprised in the scheme of widening the defendants' road. I need not deal with this point at any length, because, in my opinion, whatever might or might not be potentially included in the words "extending over a long period," every one, I think, must admit that the work there mentioned must be one work—that there must be a unity of work—and in my judgment, on the facts of the present case, especially having regard to the date of the contract for the hauling of the stone, it is quite plain that the work which was necessary and which was contemplated in the carrying out of the road-widening scheme was not one work.

Under these circumstances, I must now consider from what date the statutory limitation of time ought to run. Primâ facie—and this is the view which Darling J. obviously took throughout his judgment—the period of limitation is twelve months from the date at which the damage was done. If the limitation runs from that point, then the amount of damage recoverable in the present case would be 50*l*. But it is said that the limitation does not run from that date, and that the twelve months' limitation from the time at which the damage was done has no application "where the damage is the consequence of any particular building contract or work extending over a long period." In that case it is said that the statutory limitation is a period of six months from the completion of the contract or the conclusion of the work, and that consequently the plaintiffs are not entitled to recover anything. I cannot agree with that contention. I think the statutory limitation

is intended to be twelve months from the doing of the damage, and that the subsequent clause was introduced merely for the purpose of extending the twelve months for a further period in cases in which the twelve months' limitation would operate oppressively. Under these circumstances, it is in my judgment not right to say that the plaintiffs can recover nothing. I think that they are entitled to recover the 50*l.* in respect of the damage done within the twelve months before the issue of the writ.

I wish only to add a word about the suggestion made by Mr. Mathew, that the latter part of clause (*b*) of s. 12 of the Locomotives Act, 1898, was meant to apply only to a case in which the action was brought—not against the person *by* whose order the damage was caused—but against the person *in consequence of* whose order the damage resulted. I cannot see anything in this clause which would justify us in so reading it. But I have no doubt that these words were introduced into the Act very much for the reason that the Legislature considered that when they were by this Act imposing a liability on a man who had not done the acts which caused the damage, either by himself or by his servants, it might be convenient that in such a case there should be an extension of the time within which the action must be brought. Probably that was the motive; but I cannot limit the words in the way which Mr. Mathew has suggested.

The result is that the plaintiffs will recover damages to the extent of 50*l.*, and they will have the costs of this appeal. But we think that there ought not to be any costs of the trial before Darling J. on the one side or the other.

ROMER L.J. I am of the same opinion. In the first place, it is clear to me that the Public Authorities Protection Act, 1893, has no application to this case. It was admitted, and rightly so, on behalf of the respondents, that this cannot be said to be an "action, prosecution, or other proceeding in respect of any alleged neglect or default in the execution of an Act of Parliament or of a public duty or authority." But it was contended that it is an action, prosecution, or other proceeding

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against a person—which includes a corporation—"for an act done in pursuance or execution, or intended execution, of a public duty or authority." When the facts are considered it is, I think, clear that this action does not fall within the words which I have just read. The damage done to the road in question was done by certain contractors, and those contractors were not the servants or agents of the defendants in doing that damage. The contractors were simply persons who had contracted to deliver stone within the limits of the defendants' borough; and the way in which they should do that was a matter for them, and not for the defendants, to consider. Therefore it certainly cannot be said that the acts which caused the damage were done by the defendant corporation "in pursuance or execution, or intended execution, of any Act of Parliament or any public duty or authority." And I need scarcely point out that it certainly cannot be said that the contractors, when they did the damage, were acting "in pursuance or execution, or intended execution, of any Act of Parliament, or in consequence of any public duty or authority," for they had none. This, to my mind, shews that the Act of 1893 has no application to the present case. This point does not appear to have been brought to the attention of Darling J.; at any rate, he has not dealt with it in his judgment. He appears to have considered only the point whether, assuming the Act of 1893 to apply, it had been repealed, and if so to what extent, by the Locomotives Act, 1898.

Having, then, decided that the Act of 1893 has no application, we have next to consider whether the plaintiffs in bringing this action are within the limitation of time imposed by s. 12 of the Locomotives Act, 1898. Speaking for myself, I must say that I think that section is a difficult one to construe, and I can see that many questions of great difficulty may arise upon it hereafter. If we look only at the first words of sub-s. 1 (*b*) of s. 12, it is clear that the plaintiffs would be entitled to recover something, namely, 50*l*., in respect of damage done within twelve months before the date when the action was brought. But it was said on behalf of the defendants that that limited right of the plaintiffs is cut down by the subsequent words of

sub-s. 1 (*b*), that the damage is "the consequence of work extending over a long period," and therefore the action must be brought within six months after the completion of the work. I should hesitate long before coming to the conclusion that the right to sue for any items of damage done within twelve months before action brought was ousted because they were the consequence of work extending over a long period, thus curtailing the right to bring the action. I should hesitate to say that such work could be said to be "work extending over a long period" within the meaning of sub-s. 1 (*b*). But, though it appears to me a difficult point, I cannot help thinking that the real effect of sub-s. 1 (*b*) is this—that all items of damage which were done within twelve months before action brought are recoverable, and that the second part of sub-s. 1 (*b*) was intended to give an extended time within which an action may be brought to recover the expense of damage done, and not to curtail the limitation of time imposed by the earlier portion of sub-s. 1 (*b*). I gather that from the wording of the clause generally and the use of certain expressions in it, and in particular the use of the phrase "or where the damage is the consequence of any particular building contract or work extending over a long period." The words "long period" shew, to my mind, that what the Legislature were aiming at was to give a right to recover expenses in respect of damage which would otherwise have been barred by the earlier part of the clause. They clearly contemplated work extending over so long a period that, but for the added words, the earlier part of the clause would apply. At any rate, that is the view which I take of this clause, although, speaking for myself, I cannot say that the clause is perfectly clear. That being so, it appears to me there is no answer to the plaintiffs' claim to the extent of the 50*l*.

With regard to the balance of the claim, I think the plaintiffs are barred because they do not fall within the earlier portion of sub-s. 1 (*b*), and they cannot bring themselves within the latter part unless they can make out that the work was not completed until within the six months before action brought.

That brings me to consider what is, I think, in all these cases

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really a question of fact. What in the present case was the work which was being done, and of which the consequence was damage done to the highway? On that matter of fact I come to the conclusion that the whole of the work which was being done by the defendants in respect of their improvements cannot be regarded as constituting for the purpose of this case one work. I think the real "work" was that which was being done by the contractors under the separate contract between them and the defendant corporation, in pursuance of which the haulage occurred which caused the damage to the plaintiffs' highways. I think that was a separate work. It was that work and that alone which necessitated the haulage which caused the damage, and that haulage clearly came to an end long before the six months preceding the commencement of the action, and due notice was given to the plaintiffs by the defendants almost immediately after, if not on the very day on which the haulage ceased and the contract with the contractor came to an end. That, I think, is the true view of the question of fact which arises in this case, and therefore the plaintiffs can recover nothing in this action beyond the 50*l*.

STIRLING L.J. I have arrived at the same conclusion.

The first question is, whether the Public Authorities Protection Act, 1893, applies; and in my opinion it does not. The material facts are these: The defendant corporation, being about to widen a road in respect of which they were the highway authority, entered into a contract with contractors for the supply of stone to enable them to do so. The contractors brought the stone from a distance over roads outside the district of the Folkestone Corporation, and within the authority of the Kent County Council, and thus damaged those roads. The contract did not impose on the contractors any obligation to bring the stone in this particular way; but they in fact did so, with the result that the corporation are now called upon, under the Locomotives Acts of 1878 and 1898, to pay the extraordinary expenses occasioned to the Kent County Council by the damage which has been thus done to their roads.

The contractors were not the servants of the corporation; they were independent contractors, and they acted as they did simply in order to carry out the contract which they had entered into with the corporation of Folkestone, and not in pursuance or execution of any public duty or authority.

It is said that the Act of 1893 applies, and it is contended that this action was brought for an act "done in pursuance or execution, or intended execution, of an Act of Parliament or of a public duty or authority"—an act done, it is said, by the corporation of Folkestone. Inasmuch, however, as the contractors were not the servants of the corporation, the act certainly was not done by the corporation, and in my judgment it was done by the contractors, and in doing it they were not acting in the execution of any public duty or authority, but, as I have already said, simply in performance of the private obligations which arose from the contract into which they had entered with the Folkestone Corporation. Therefore, in my judgment, the Act of 1893 has no application.

We then have to consider how far s. 12 of the Locomotives Act, 1898, applies. [The Lord Justice read sub-s. 1 (*b*), and continued:—]

Both sides attempted to bring the case within the second alternative. It was contended that the damage was "the consequence of work extending over a long period"; but the plaintiffs and the defendants differed as to what that work was. On behalf of the plaintiffs it was said that the work was a scheme of improvement within the borough of Folkestone. The execution of that scheme commenced in the year 1902 and continued until September, 1903, and the action was commenced on February 11, 1904, and consequently was brought within six months after the completion of that work.

In my judgment, however, the work of which the damage was the consequence was not that scheme of improvement, but was the work done in pursuance of the contract with the contractors for the supply of the stone, and the stone, it appears, was ordered, not exclusively for the purpose of that scheme of improvement, but also for other purposes of the corporation, and the contract came to an end at any rate not

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later than March 31, 1903, and consequently the six months had elapsed long before the action was brought. Then, that being so, it was contended that the limit within which the plaintiffs must bring their action under sub-s. 1 (*b*) of s. 12 was the period of six months from March 31, 1903, and that they were not entitled to sue the defendants in respect of any damage which was done within twelve months before the action was brought. In other words, it was said that the periods within which the action must be brought are divided by sub-s. 1 (*b*) into two classes, the one as to which there is a six months' limitation, and the other as to which there is a twelve months' limitation, and that an action cannot be brought within both of them. I do not so read the clause. The meaning, as it seems to me, is that the highway authority who is complaining may bring the action within twelve months after the damage has been done and recover for damage done within that period, and that, further and in addition to that, the authority complaining may recover for damage which had not been caused within the twelve months, provided the damage is "the consequence of any particular building contract or work extending over a long period," and in that case the action must be commenced not later than six months after the completion of the contract.

I think, therefore, that the defendants have not shewn a good defence as regards the damage which was done during the period between February 11, 1903, and March 31, 1903, when the contract for hauling stone expired, and in respect of that the learned judge has assessed the damages at 50*l*. Consequently, there must be judgment for the plaintiffs for 50*l*.

Appeal allowed in part.

Solicitors: *Church, Adams & Prior, for Charles Turner, Maidstone; Holt-Beever & Crowdy, for A. F. Kidson, Folkestone.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Jan. 13, 14, 16, 17; *Feb.* 6.

BOSTON FRUIT COMPANY *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Marine Insurance—Policy effected by Owner of Ship—Right of Charterer to Benefit of Policy—Time Charter—Demise of Ship—Injury to another Ship by Collision—Negligence of Master and Crew of Chartered Ship.

A policy of insurance upon a ship was effected by brokers, who were instructed to do so by agents for the owners of the ship. The policy was expressed to be effected by the brokers "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." The policy contained a collision clause.

The ship was chartered to the plaintiffs by a time charter, which amounted to a demise of the ship to the charterers for the specified term.

The charterparty provided that the master, officers, and crew of the ship were to be appointed by and paid by the charterers. There were also the following clauses:—

"17. In the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, breakdown or other causes, the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports, shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood, in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance."

"22. The owners shall pay for the insurance on the vessel."

The name of the charterers did not appear in the policy.

During the term of the charterparty a collision took place between the ship and another vessel. The collision was caused by the negligence of the master, officers, and crew of the ship, and the charterers were compelled to pay damages to the owners of the other vessel. The charterers sought to recover the amount thus paid from the underwriters, as being a loss covered by the terms of the policy:—

Held, that the words of the policy were wide enough to cover the interest of the charterers, but that outside those words there was no

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evidence, except in the terms of the charterparty, to prove an intention to insure on behalf of the charterers:

Held, also, that the terms of the charterparty did not justify the inference that the policy was intended to be effected on behalf of the charterers, and that, there being no evidence of ratification or adoption of the policy by the charterers, the action could not be maintained.

Decision of Bigham J. affirmed.

APPEAL from a decision of Bigham J.

The question was whether the charterers of a ship were entitled to sue the underwriters upon a policy effected on behalf of the owners of the ship.

The action was brought upon a policy of insurance, dated April 5, 1895, on the steamship *Barnstable*, effected with the defendant company. The policy was a valued policy, on "hull and material, 12,000*l.*; engines and machinery, 7000*l.*—19,000*l.*" Collision and other clauses were attached. The policy was a time policy, from March 21, 1895, to March 20, 1896. The action was by the charterers against underwriters, and the question was whether the charterers were entitled to sue on the policy. The policy was effected by Messrs. John Holman & Sons, insurance brokers, on the instructions of Messrs. R. Craggs & Sons, who were described in the charterparty as "agents for the owners." The policy was expressed to be effected by John Holman & Sons "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all."

On January 13, 1896, the *Barnstable* came into collision with a ship called the *Fortuna*, and the *Fortuna* was sunk. The collision was caused by the negligence of the master and crew of the *Barnstable*.

The plaintiffs were the charterers of the *Barnstable*. By a charterparty dated March 10, 1894, and made between R. Craggs & Sons, described therein as agents for the owners, and the plaintiffs, the plaintiffs chartered the *Barnstable*, which was then being built by Messrs. Craggs & Sons, for thirty-six calendar months from March, 1893. The charterparty amounted to a demise of the *Barnstable* to the charterers for the thirty-six months

By clause 1 of the charterparty the owners of the ship agreed (the words "to let" were apparently omitted) and the charterers agreed to hire the steamship for thirty-six calendar months, commencing on March 1, 1893. By clause 2 the charterers were to provide and pay for stores, tackle, &c., and for the provisions and wages of the captain, engineers, and crew, who, excepting the "guarantee engineer," were to be appointed by them; and it was agreed that the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches with chain, gear, and donkey boiler. By clause 3 the charterers were also to provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Clause 4 provided for the payment for the use and hire of the vessel. By clause 17, "In the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four working hours, the payment of the hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, breakdown, or other causes the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood, in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." By clause 22, "The owners shall pay for the insurance on the vessel."

The *Barnstable* at the time of the collision was employed by the plaintiffs under the charterparty, the master and crew having been appointed by them. On January 15, 1896, the owners of the *Fortuna* instituted a suit against the *Barnstable*,

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in the Federal District Court for the district of Massachusetts, claiming damages in respect of the collision. On the petition of the owners of the *Barnstable* the Boston Fruit Company, as charterers of the ship, were made parties to the suit. At the hearing in the District Court the liability of the *Barnstable* was admitted, and the damages were agreed at $14,575, and the suit thenceforward proceeded as an independent cause between the Boston Fruit Company and the owners of the *Barnstable* to determine which, as between them, was liable to pay the damages. This suit, after going through the Circuit Court of Appeals and the Supreme Court of the United States, was ultimately decided in favour of the owners. The Boston Fruit Company, having paid the whole damages to the owners of the *Fortuna* in accordance with the result of the suit, by the present action claimed from the defendants their proportion of the sum thus paid as being a loss covered by the policy of insurance.

Bigham J. held that the plaintiffs could not maintain the action. He said that before the plaintiffs could recover it must be shewn by clear evidence that the person who effected the policy intended at the time to effect the policy on the plaintiffs' behalf. In the opinion of the learned judge, there was no evidence of such an intention, and he held that it could not be inferred from the terms of the charterparty.

The plaintiffs appealed.

Carver, K.C., and *A. Llewelyn Davies*, for the plaintiffs. This time charter is really a demise of the ship to the charterers for the specified period; the ship is handed over to them, and they are in effect the owners of the ship for the time. It is contended that clause 22 of the charterparty amounts to a contract by the owners of the ship that they will effect and pay for the insurance of the ship, and this view is confirmed by clause 17. By the charterparty the burden of the ordinary risks of the sea is placed upon the owners, but the risk of damage not accidental—i.e., damage caused by the negligence of those who are navigating the ship, including damage to other ships and also contribution to general average

—is placed upon the charterers. The parties contemplated that there would be an insurance of the ship and only one insurance, and they must have intended that the policy should enure to the benefit of both the owners and the charterers. It is immaterial whether the brokers knew who was to be interested under the policy: *Small* v. *United Kingdom, &c., Insurance Association.* (1) It is submitted that upon the facts Bigham J. was not justified in holding that the owners of the ship effected the policy for their own protection only. The learned judge did not bear in mind clause 22 of the charterparty. That clause imposed on the owners an obligation to insure for the benefit of the charterers, and it must be assumed that they intended to fulfil that obligation. The form of the policy leads to that conclusion. The words are sufficient to cover loss resulting from the negligence of the master and crew of the ship, a loss which by the terms of this charterparty would fall upon the charterers. If, in the absence of proof, there is a presumption that the owner of a ship insures for his own benefit, the onus is shifted by the facts of the present case. In *Small* v. *United Kingdom, &c., Insurance Association* (2) it was held that a policy effected upon the instructions of the master of a ship, of which he was a co-owner, enured for the benefit of a mortgagee of the ship. The law on this point is stated in Arnould on Marine Insurance, 7th ed. vol. i. ss. 172, 173, pp. 212–214. Even if there were no intention on the part of the owners to insure for the benefit of the plaintiffs, still it is submitted that the plaintiffs are entitled to the benefit of the policy, the terms of it being sufficient to include their interest. This loss does appertain to the time charterers. In *Crawley* v. *Cohen* (3) it was held that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge. Assuming that it is necessary to prove an intention on the part of Craggs & Sons to insure on behalf of the plaintiffs, the proper inference, looking at the policy and the charterparty together, is that the owners intended to cover the risks of the charterers.

(1) [1897] 2 Q. B. 42, at p. 45.
(2) [1897] 2 Q. B. 42.
(3) (1832) 3 B. & Ad. 478; 37 R. R. 472.

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If it was the duty of the owners to take out a policy for the benefit of the charterers it is not necessary to prove intention, and in this case it is submitted that the relationship between Craggs & Sons and the plaintiffs was such that the plaintiffs are entitled to the benefit of the policy, whatever may have been the intention of Craggs & Sons. The cases cited in Arnould on Marine Insurance, 7th ed. vol. i. s. 173, in support of the proposition, that the intention of the person who directs the insurance to be effected is the test in determining who are entitled to the benefit of the policy, do not bear out that proposition. In *Routh* v. *Thompson* (1) the intention of the captors was to insure the ship for their own benefit; but Lord Ellenborough held that they must be taken to have insured for the benefit of the Crown, although the Crown was not mentioned. That intention is not the test appears from *Lucena* v. *Craufurd* (2) and *Grant* v. *Hill*. (3) The only case which points in a contrary direction is *Irving* v. *Richardson* (4); but in that case there was no duty on the part of the insurer, who was a mortgagee of the ship, to insure on behalf of the mortgagor. In *Watson* v. *Swann* (5) the plaintiff could not have been contemplated as being a person for whose benefit the policy should enure at the time when it was effected, and therefore it was held that he could not sue on the policy. *Byas* v. *Miller* (6) depends on the same principle. This policy is made on behalf of whomsoever it may concern, and if the plaintiffs fall under that description they are entitled to the benefit of the policy. In order to take a benefit under the policy a person must be named or sufficiently designated therein; but the question does not depend upon the undisclosed intention of the parties: *Keighley, Maxsted & Co.* v. *Durant*. (7) That is a general principle of law, and there is nothing in the law of marine insurance to take this contract out of the general rule.

(1) (1809) 11 East, 428; (1811) 13 East, 274; 10 R. R. 539.

(2) (1806) 2 Bos. & P. (N.R.) 269; 6 R. R. 659.

(3) (1812) 4 Taunt. 380.

(4) (1831) 2 B. & Ad. 193; 36 R. R. 541.

(5) (1862) 11 C. B. (N.S.) 756.

(6) (1897) 3 Com. Cas. 39.

(7) [1901] A. C. 240.

[They also referred to *Hill* v. *Scott* (1) and *Scott* v. *Globe Marine Insurance Co., Ld.* (2)]

Scrutton, K.C., J. A. Hamilton, K.C., and *Maurice Hill*, for the defendants. By the charterparty the owners took on themselves the risks referred to in clause 17 whether they insured or not, and therefore the charterers have no interest in the policy. The person entitled to sue on a policy must be either the broker by whom the policy is effected or the person on whose behalf it is intended to be effected: *Watson* v. *Swann* (3), per Willes J. A purchaser of a ship cannot sue on a policy taken out by a previous owner, though he becomes a person having an interest in the policy and though he ratifies the policy: Arnould on Marine Insurance, 7th ed. vol. i. s. 174; and see Duer on Marine Insurance, vol. ii. pp. 28–38.

[VAUGHAN WILLIAMS L.J. In Phillips' Law of Insurance, s. 179, it is stated that policies are frequently made in reference to a future interest.]

Here all the substantial interest in the ship is in the owners. There is no duty on the owner under this form of charterparty to insure for the charterer: *Aira Force Steamship Co., Ld.* v. *Christie*. (4) If the charterer seeks to shew that an owner who has no duty to insure for his benefit did in fact insure for him, it is for him to prove it; but in the present case the owners did not effect this policy for the benefit of the charterers, and this is shewn by the proceedings in the United States. The policy is to enure for those only for whose benefit it was intended to be effected. Willes J., in *Watson* v. *Swann* (5), merely stated the law as it had been previously stated in the text-books: Phillips' Law of Insurance, 3rd ed. ss. 382, 385; Parsons' Marine Insurance, 1st ed. vol. i. p. 47; Arnould on Marine Insurance, 2nd ed. vol. i. p. 209; and the question whose interests were intended to be insured is a question for the jury: *Irving* v. *Richardson*. (6) Here the question for the jury would be, Did Craggs & Sons intend to insure on behalf of themselves alone, or did they intend to

(1) (1895) 1 Com. Cas. 140, 200.
(2) (1896) 1 Com. Cas. 370.
(3) 11 C. B. (N.S.) 756, 772.
(4) (1892) 9 Times L. R. 104.
(5) 11 C. B. (N.S.) 756.
(6) 2 B. & Ad. 193; 36 R. R. 541.

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insure on behalf of the charterers also? In *Byas* v. *Miller* (1) it was held that the plaintiff, who was not the principal of a broker at the time when he obtained the slip from the defendant, an underwriter, the defendant not being told who the principal was, could not ratify the contract made by the broker, and could not maintain against the defendant an action on the policy. In *Routh* v. *Thompson* (2) the instructions for the policy were given on behalf of the "captors" of a prize, and the Crown, who really had the interest in the prize, ratified the policy. There was ratification of the act of a person who without authority to do so intended to act on behalf of the person who had an insurable interest. In *Hagedorn* v. *Oliverson* (3) there was a finding that the plaintiff who had effected the policy did so on behalf of the person who ultimately ratified and claimed the benefit of the policy. It is contended that the present plaintiffs did not ratify. In the American proceedings they disclaimed any interest in the policy, and they cannot after that turn round and adopt it.

The first subject-matter of this policy is the ship. The collision clause was not needed to enable the owner to recover general average according to the law of England. No policy covers loss resulting from delay caused by adverse winds, &c., without damage to the ship. Clause 22 cannot mean that the owners are to pay the expenses and the charterers are to have the benefit. The clause was inserted for the benefit of the owners. There are some expenses which are not covered by the insurance.

[VAUGHAN WILLIAMS L.J. You say it means the expenses which are covered by the bargain contained in clause 2?]

Yes. "Stress of weather," unless it causes damage to the ship, is excluded, and that damage is covered by clause 1. Clause 3 is a common one, but it is not easy to understand the reason for it. Unless clause 1 applies, the charterer has to continue paying the hire of the ship. Clause 22 was inserted because of the very general words of clause 3; it was for the protection of the owners, and to shew that that clause did not

(1) 3 Com. Cas. 39. (2) 13 East, 274, 276; 10 R. R. 539.
(3) (1814) 2 M. & S. 485; 15 R. R. 317.

include insurance. The charterers may have a contractual right as against the owners, but they have no direct right as against the underwriters. Clause 22 is very similar to that in *Aira Force Steamship Co.* v. *Christie.* (1) There the action was brought by the owners against the charterers for injury to the ship caused by their negligence, and the defendants unsuccessfully raised the point which is raised by the present plaintiffs. If primâ facie the charterers have an interest under the general words of the policy, there is, it is submitted, abundant evidence to rebut this presumption.

If, when a ship is in the hands of the charterer, the owner comes forward and gives bail in order to prevent the seizure of the ship, is this a voluntary payment which the owner cannot recover under the collision clause, because he is under no personal liability for the collision? Is it a proper inference that the collision clause was inserted for the benefit of the charterers? It is said that the insurance must have been for the benefit of the charterers, because the owners had a very limited interest in the ship. But the interest of the owners was really the greater. The collision clause clearly contemplates the liability of the ship in rem.

Ratification must be within a reasonable time: Pollock on Contracts, 7th ed. p. 98. In the present case the collision took place in 1896. It is conceded that there may be ratification after the loss, but here the time which elapsed exceeded any possible limit of reasonableness, and the right to ratify is excluded. Even if the onus is on the defendants, it is shifted when it is shewn that the instructions for the policy were given by the agents of the owners. On the construction of the charterparty it is not clear that there is an obligation on the owners to insure, and, even if there is, it does not follow that there was an obligation to have a collision clause inserted in the policy.

Carver, K.C., in reply. A great part of general average would fall upon the charterers, and that liability, it is contended, is covered by the policy. There is really no evidence as to "intention" one way or the other. The admissions

(1) 9 Times L. R. 104.

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which were made in the American action were made only for the purposes of the argument in that case. The brokers were acting on behalf of the adventurers.

Aira Force Steamship Co. v. *Christie* (1) is distinguishable. In that case the charterparty provided that the owners "shall pay for the insurance on the vessel (if any)." Moreover, the report of the case does not state that there was a demise of the ship, as there was here.

The charterparty imposed on the owners an obligation to insure the ship, and, when they effected a policy the terms of which are wide enough to include the charterers, it must be assumed that they intended thereby to fulfil that obligation.

If A. effects an insurance upon dynamite to be carried by a specified ship, that would primâ facie mean his own goods, and the policy would not cover dynamite belonging to B. This explains the decision in *Byas* v. *Miller*. (2) If there is nothing else to shew what was intended, the Court would be driven to evidence of intention.

In the present case there can be no doubt as to the subject-matter of the policy, and primâ facie every one who has an interest in that subject-matter is covered by the policy. It must be shewn that it was intended to exclude the charterers. The charterers have in effect paid the owners for the insurance. Until the present action there had been no litigation between the charterers and the owners; the charterers were brought into the American proceedings, and they cannot have given up their rights under the policy by an admission which they made in that litigation for a different purpose. A contract may be ratified at any time before it has come to an end. The plaintiffs did not know what were the terms of the policy until they sought to obtain the benefit of it. Knowledge is essential to election.

Cur. adv. vult.

Feb. 6. VAUGHAN WILLIAMS L.J. read a judgment in which, after stating the facts as above, he continued:—The name of the Boston Fruit Company, the plaintiffs, nowhere

(1) 9 Times L. R. 104. (2) 3 Com. Cas. 39.

appears in the policy, and it follows that to entitle the plaintiffs to sue on the policy, which was not effected by the plaintiffs themselves, they must shew either that it was made on their behalf by John Holman & Sons, authorized to act for them, or that their act has been subsequently ratified and adopted by the plaintiffs. It is not suggested that the Boston Fruit Company had any direct communication with the brokers John Holman & Sons; the suggestion is that R. Craggs & Sons either instructed John Holman & Sons on behalf of the Boston Fruit Company, being authorized so to do by necessary implication arising from the terms of the charterparty, or that, even if Craggs & Sons did not effect the policy on the authority of the Boston Fruit Company, yet the terms of the policy are sufficient to describe the Boston Fruit Company and cover their interest in the ship, and that the Boston Fruit Company have ratified and adopted the agency thus assumed on their behalf. Bigham J., who gave judgment in favour of the defendants, said in his judgment: "Now, before an underwriter can be made liable on a policy at the suit of a plaintiff whose name does not appear on the face of the document, it must be shewn by clear evidence that the person taking out the policy intended at the time to effect the insurance on the plaintiff's behalf"; and he then proceeded to shew that there was no evidence here of any such intention, and that all that can possibly be contended is that the intention ought to be inferred from the terms of the charterparty.

I will deal presently with the terms of the charterparty, and the inferences which ought to be drawn from those terms; but before doing so I should like to say that I am not sure that Bigham J. is right, if he means that the onus of proving the intention is thrown on the plaintiff who is suing on the policy in a case like the present, where the words defining the interests intended to be covered by the policy are manifestly wide enough to cover the plaintiffs' interest. The following passage in Duer's Marine Insurance, vol. ii. Lecture IX. p. 36, does not seem quite consistent with this view. He says: "When it is said that the general words of the policy must in their personal application be limited to those for whom the insurance was intended,

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it is by no means a necessary consequence that these words must always be understood in a limited sense. The intention of the party effecting the policy may be co-extensive with its terms. He may really mean that every person who may be proved to have an interest in the property, according to the nature of his interest, shall be entitled to the benefit of the contract; and where the persons, who are or may be interested, are unknown to the agent, such is usually his intention." Now, in the present case, the agents with whom we are concerned are not John Holman & Sons, who effected the policy and who are named in the contract, but Craggs & Sons, from whom they received the directions to insure. The charterers certainly were not unknown to Craggs & Sons; but I should hesitate to say that because of this knowledge of Craggs & Sons the charterers cannot rely on the general words, unless they give extrinsic evidence of the intention of Craggs & Sons to insure on their behalf. In the present case there is no evidence whatever, outside the general words of the policy, available to prove the intention to insure on behalf of the plaintiffs, except the terms of the charterparty itself. The case of the plaintiffs is really based on the terms of the charterparty, which, it is said, either cast a duty upon Craggs & Sons to insure on behalf of the charterers, or at least authorized them to insure on their behalf; and it is said that in either case, as the policy contains words wide enough to cover the interest of the charterers, it must be inferred, in the absence of evidence to the contrary, that the intention of Craggs & Sons was to insure their interest. If this contention is right, no question of ratification, properly so called, would seem to arise. The case would then resolve itself by the answer to the question—Did the charterers, by the terms of the charterparty, authorize the effecting of the policy on their behalf? For, in my judgment, the policy actually effected does in words cover the interest of the charterers. If, however, the terms of the charterparty do not authorize Craggs & Sons to effect a policy covering the interest of the charterers, I cannot come to the conclusion that the charterers ever ratified or adopted the policy. On the contrary, they seem to me, with the consent of

the owners, to have rejected the agency of the owners in that behalf, and I doubt whether it was necessary, for the rejection of that agency, that it should be communicated directly to the underwriters, especially as it is agreed between the plaintiffs and the underwriters that the stipulation regarding facts in the American record, and the evidence taken, shall be included as part of the agreed facts in this case.

It remains to consider the effect of the terms of the charterparty and see whether there is anything in it either constituting or excluding an obligation or authority on or to Craggs & Sons to insure on behalf of the charterers. [The Lord Justice referred to the clauses of the charterparty which are above stated, and continued :—]

Now, it cannot be doubted that clause 2 throws on the owners the responsibility for the maintenance of the vessel in an efficient state in hull and machinery for the service, and it seems clear that under this charterparty, which amounts to a demise, the charterers are not only responsible for the negligence of the master and crew towards third persons, but that, as between the owners and the charterers, losses arising from such negligence must fall on the charterers; but this, of course, does not prevent the owners having an insurable interest in the ship or in anything else covered by this policy.

Such being the general scope of the charterparty, I will now consider what is the meaning of clauses 17 and 22, and what is their application to the present case, in which it is an agreed fact that the collision was caused by the negligence of the master, mates, or crew in charge of the navigation of the steamship. Now what is the meaning of clause 17? The first part of clause 17, down to and including the word "service," provides for the cessation of payment of hire "in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four working hours," and the hire is to cease "from the hour when detention begins until the ship be again in an efficient state to resume her service." The clause is clumsily drawn. The loss of time which prevents

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the working of the vessel may apparently arise from causes over which the owner has no control—for instance, a collision might arise from negligent navigation of another ship, or it might arise from negligence of the charterers' servant, or the causes of the loss of time might arise from the perils of the sea, or the loss of time might arise from imperfections in the machinery provided by the owners—but in each and all these cases the payment of hire is to cease, and the owners have an insurable interest in the loss of time arising from these causes; and then the clause provides that "port charges, pilotages, and other expenses shall be borne by the owners" if the vessel should put into any port or ports other than those to which she is bound, if that is the consequence of certain causes, and one would expect to find the causes identical with those before mentioned. But they are not identical. "Stranding" is omitted, as also the words "or any cause appertaining to the duties of the owner," and the words "such deficiency" are introduced. I think that the differences arise simply from careless drafting, and that mere repetition was intended. Then follows an antithetical passage: "But should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers." Now I think that this means a stress of weather not resulting in any of the above-mentioned causes as the proximate cause of detention. Then clause 17 concludes: "It is understood in the event of the steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses, as the owners are by their insurance." It is suggested that this concluding clause entitles the charterers, at all events when read in conjunction with clause 22, to the benefit of the policy taken out by the owners as a policy taken out on their behalf, or at all events is consistent with the policy having been taken out on their behalf. I cannot agree. I cannot believe that clause 22, taken alone, means anything more than that the owners are to pay the premiums on any insurance of the vessel which they should choose to effect, and that the owners should not be entitled to charge the charterers in account with these

premiums. Nor do I think that the consideration of clause 17 alters this conclusion. I think that the effect of the whole charterparty, including clause 17, is to leave the charterers liable, as between themselves and the owners, for the consequences of negligent navigation; and I cannot find in clause 17 itself, or in clause 17 read in conjunction with clause 22, any words sufficient to cast on the owners the obligation to insure on behalf of the charterers against collision or detention risks. I do not think that the word "covered" in clause 17 imports a contract by the owners to effect a policy on behalf of the charterers. I think "cover" means no more than that the owners will give the charterers the protection of the policy to the extent that they happen to insure against risks cast on the charterers by the charterparty. But this does not affect the underwriters, and I cannot find in the charterparty or elsewhere any sufficient evidence to justify the inference that the policy effected by the owners was intended to be effected on behalf of the charterers. On the contrary, I think that the terms of the charterparty would exclude such an inference, even on the assumption that the onus of proving the exclusion is cast upon the underwriters. Moreover, I think it is impossible to leave out of consideration evidence in the American litigation, given on behalf of the now plaintiffs, that it was optional with the owners whether they insured or not, and that insurance did not concern the charterers. In my opinion the judgment of Bigham J. should be affirmed, and the appeal be dismissed with costs.

ROMER L.J. This case took a long time to argue, and many questions were discussed in the course of the argument. But in my view the appeal should be dismissed on grounds which, after what my Lord has said, I can state shortly.

The policy of insurance on the face of it states that the insurance company is contracting with John Holman & Sons "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." That is a common form, which has often received judicial

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consideration and interpretation. On the face of it a large number of persons might be included. But, on the authorities, it appears to me that it has long been decided and is now settled law that not every person who is included in the wide terms of the policy is of right entitled to the benefit of the insurance as against the insurer. Only those persons are entitled on whose behalf the policy was in fact effected. In some of the cases which establish this the expressions used are that only those persons are entitled who at the time when the policy was effected were "contemplated" as being or "intended" to be covered by the policy; but I think these expressions mean that which I have stated. Now I need not consider the question whether, if there be no facts admitted or proved to shew on whose behalf the policy was in fact effected, any one who comes within the wide terms of the policy could not properly sue on it; for, in my opinion, there are in the present case facts which enable me to come to a conclusion as to the persons who are entitled to sue on the policy. It is admitted that the policy was in fact taken out by the brokers on the instructions of the agents for the owners of the ship. It is not suggested on behalf of the charterers that they ever gave any instructions to the brokers, and when I look at the terms of the policy I find it is a policy such as the owners might well take out for themselves, without regard to any one else. This being so, the conclusion which I draw from the above facts, in the absence of any other sufficient facts established leading to the opposite view, is, that the owners, on whose behalf the brokers were instructed, were the persons and the only persons on whose behalf the policy was in fact effected, and therefore the only persons entitled to sue upon it.

That leads me to the consideration whether there are any other circumstances in this case sufficient to prevent the above primâ facie view from being maintained. The only circumstance relied on by the plaintiffs is the charterparty, and in particular clauses 17 and 22. As to this I can only say that, after a careful consideration of the charterparty and of those two clauses in particular, I cannot come to the conclusion that by the charterparty the shipowners contracted with the charterers

that they (the owners) would effect an insurance on the ship on behalf of the charterers as well as of themselves. Nor do I feel able to infer from the charterparty that the policy was or ought to be treated as effected on behalf of the charterers. And it is satisfactory to me to know from the proceedings in the United States of America that this view appears to have been for some years taken alike by the owners and the present plaintiffs. On these grounds the appeal, in my opinion, fails.

STIRLING L.J. concurred.

Appeal dismissed.

Solicitors: *Thorne & Welsford; Waltons, Johnson, Bubb & Whatton.*

W. L. C.

[IN THE COURT OF APPEAL.]

WHITE & CO. *v.* CREDIT REFORM ASSOCIATION AND CREDIT INDEX, LIMITED.

Practice — Discovery — Interrogatories — Defamation — Privilege — Malice — Information on which Defamatory Statement founded — Names of Informants—Names of Persons to whom Libel published.

In an action of libel against a trade protection society, in which privilege was pleaded, the plaintiffs sought to administer to the defendants an interrogatory, asking what inquiries they made as to the truth of the statements complained of, before publishing them, and from whom they obtained the information on which they relied in publishing those statements:—

Held, that such an interrogatory was admissible.

Elliott v. *Garrett*, [1902] 1 K. B. 870, followed.

The plaintiffs further sought to administer to the defendants an interrogatory, requiring them, by reference to their books, or otherwise, to give the names of the companies, firms, and persons to whom a certain publication of the defendants, containing the statements complained of, had been supplied, or shewn, by or through the defendants or their agents.

Held, that the interrogatory was oppressive and ought not to be allowed.

APPEAL against an order made by Bray J. at chambers allowing interrogatories as after mentioned.

The action was for libel.

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The defendants were a trade protection society, who published a book called the "Credit Index," and a key card to be used with it. In the Credit Index were entered the names of traders, a letter and a number being placed against each name. On reference to the key card it appeared that the letter indicated the estimated pecuniary strength of the trader, and the number indicated the general credit which might be given to him in his business. The entry of the plaintiffs' name in the Credit Index with a letter and a number against it, read with reference to the key card, constituted the alleged libel. No special damage was alleged. The defendants by their statement of defence (inter alia) pleaded that they published the matter complained of in good faith, and without malice, under such circumstances as rendered the occasion of the publication privileged. In particulars contained in their plea of privilege they stated (inter alia) that the Credit Index and the key card were issued only to their subscribers, being traders and others, to whom the pecuniary strength and general credit of the traders whose names were included in the Index were matters of interest and importance, and were issued only on condition that the subscribers should return the Credit Index to the defendants at the expiration of the period for which they had subscribed. The defendants had administered to the plaintiffs an interrogatory, asking whether they alleged that the defendants, in publishing the statements complained of, were actuated by malice towards them, and, if so, upon what facts and circumstances they relied as shewing actual malice. To this the plaintiffs had answered that they alleged that the defendants made no proper inquiries, and were possessed of no information or particulars concerning the pecuniary strength and credit of the plaintiffs, and, although pretending to have honestly and bonâ fide made full, careful, sufficient, and recent inquiries as to the plaintiffs' pecuniary strength and credit, the defendants had in truth and in fact made no such inquiries, and had published the particulars complained of recklessly, being indifferent as to whether the same were true or false, and for the purpose of obtaining for themselves large pecuniary profits.

The plaintiffs had obtained leave at chambers to administer

certain interrogatories to the defendants. Among these were the following: (1.) "Did the defendants before publishing the said Credit Index and key card take any and what precautions, or make any and what inquiries as to the truth of the said particulars" [i.e. the statements complained of], "or make any and what inquiry at all with respect to such particulars? From whom did the defendants obtain the information on which they relied in making the statements complained of?" (2.) "Give by reference to your books or otherwise the names of the companies, firms, and persons to whom the same" [i.e. the Credit Index and key card] "have been supplied or shewn by or through the defendants or their agents?"

The defendants appealed against the allowance by Bray J. of these last-mentioned interrogatories.

Norman Craig, for the defendants. It must be admitted that no objection can be taken in this Court to the first part of the first of the two interrogatories in question: see *Elliott* v. *Garrett* (1); but it is submitted that the plaintiffs are not entitled to require the defendants to give the names of the persons from whom they obtained the information in reliance upon which they published the statements complained of by the plaintiffs: *Hennessy* v. *Wright*. (2) There is no authority for such an interrogatory. It may be relevant to the issue whether there was actual malice on the defendants' part to know whether, in publishing the libel, they acted on any, and, if so, what information, but it is not sufficiently material to know from whom the information was obtained. The function of interrogatories is to enable a party to an action to substantiate a case of which he has knowledge, not to enable him by cross-examination to endeavour to fish out a case against the other party of which he is as yet entirely ignorant. The defendants ought not to be compelled to give the names of their informants when to do so may expose them to an action by the plaintiffs. [He cited on this point *Parnell* v. *Walter* (3); *Gibson* v.

(1) [1902] 1 K. B. 870. (2) (1888) 24 Q. B. D. 445.
(3) (1890) 24 Q. B. D. 441.

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Evans (1); *McColla* v. *Jones* (2); *MacKenzie* v. *Steinkopff* (3); *Blanc* v. *Burrows*. (4)]

The second interrogatory in question is of a very fishing character, and it would be grossly oppressive to require the defendants to answer an inquiry of such a sweeping nature merely on speculation. The defendants are willing to state how many subscribers they have, and the number of subscribers to whom they have supplied the Credit Index, and that they have only supplied it to subscribers; but they ought not to be compelled to state the names of the subscribers to whom they have supplied it. It is not shewn that the information required by the interrogatory is relevant to any issue in the case, or that it would be of any value to the plaintiffs commensurate with the burden imposed on the defendants. [He cited on this point *Dalgleish* v. *Lowther*. (5)]

McCardie, for the plaintiffs. With regard to the first of the two interrogatories, the plaintiffs are entitled to interrogate as to any facts which may support their own case or destroy the defendants' case; and it is clearly relevant to the issue whether there was actual malice on the defendants' part, which would destroy any privilege, to know from whom the information, on which the defendants relied, was obtained. It is submitted that the principle acted on in *Elliott* v. *Garrett* (6) clearly covers this interrogatory. The fact that the answer to an interrogatory may incidentally involve the disclosure of the names of persons who may be witnesses for the party interrogated does not render the interrogatory inadmissible where the names of those persons form part of the facts material to the issue: see *Marriott* v. *Chamberlain*. (7) The character and position of the persons from whom the information was received would obviously be most material to the question whether the defendants could bonâ fide have believed the statements they published.

With regard to the second interrogatory, the case which the

(1) (1889) 23 Q. B. D. 384.
(2) (1887) 4 Times L. R. 12.
(3) (1889) 6 Times L. R. 141.
(4) (1896) 12 Times L. R. 521.
(5) [1899] 2 Q. B. 590.
(6) [1902] 1 K. B. 870.
(7) (1886) 17 Q. B. D. 154.

plaintiffs seek to raise is that the defendants have published the statements complained of to persons other than those who might have an interest in knowing the matters therein stated, and in the case of whom there could be no privilege. A publication like the Credit Index cannot be privileged, if published indiscriminately to all traders, whether the nature of the trader's business is likely to bring him into relation with the plaintiffs or not. The proposed interrogatory is not of a merely fishing nature, but is relevant to the question whether the defendants have not gone outside any possible privilege by publishing the libel to persons who could have no interest in the matter.

Norman Craig, in reply.

COLLINS M.R. This is an appeal from the order of a judge at chambers allowing two interrogatories. The action is brought in respect of an alleged libel contained in a publication of the defendants, which by certain indications assigned a certain degree of solvency to the plaintiffs, and thereby, as the plaintiffs allege, conveyed to those who understood their meaning a reflection injurious to the plaintiffs' credit. The defendants set up by way of defence that the alleged libel was a privileged communication. The first of the interrogatories in question is as follows: "Did the defendants, before publishing the said Credit Index and key card, take any and what precautions, or make any and what inquiries as to the truth of the said particulars, or make any and what inquiry at all with respect to such particulars: from whom did the defendants obtain the information on which they relied in making the statements complained of?" It is necessary to consider the position of the parties to the action in order to determine whether this interrogatory is admissible. The statements complained of being assumed for this purpose to give primâ facie a cause of action, the defendants set up by way of answer that the publication of them was privileged on the ground that those statements were published by them without malice, and bonâ fide, in the belief that they were true, to persons who had an interest in knowing the matters so stated. It is contended

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for the defendants that it is not sufficiently relevant to the issue on that defence to inquire from whom the information upon which the defendants relied was obtained. Now, to begin with, it is clear law since the case of *Elliott* v. *Garrett* (1) that the interrogatory here in question is, as regards its main substance, legitimate. The interrogatory allowed in that case was: "What information, if any, had you that induced you to believe that the words were true, or what steps, if any, had you taken before speaking the words to ascertain whether they were true or not?" Therefore, it is clear that, the question being as to the condition of mind of the person publishing the defamatory statement, the amount of information upon which he acted, and the means taken by him to ascertain the truth of that statement, are legitimate subjects for interrogation. If so, why should one stop there? The issue being as to the condition of mind of the defendants when the libel was published, and whether they were actuated by malice, an important factor would be, not merely what inquiry they made into the truth of the statements published, but to whom such inquiry was addressed. If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all the facts; and it is obvious that, if the information upon which he acted was procured from a person or persons who could not possibly know anything about the matters in question, and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice. To sever the question from whom such information was obtained from the question whether any and what information was obtained appears to me quite illogical. I can see no principle on which, or reason why, such a severance should be made. In some cases, of course, countervailing rights and considerations might have to be taken into account. There might in some cases be ground for thinking that the inquiry as to the persons from whom the information was obtained was made with some illegitimate motive, and that the plaintiff was really seeking to assert some right of action against the persons who gave the information

(1) [1902] 1 K. B. 870.

to the defendant. If there were ground for the suggestion that the inquiry was not made bonâ fide for the purposes of the pending action, and therefore was made for other purposes than those for which the law allows interrogatories, then such an interrogatory would be oppressive and illegitimate, and ought not to be allowed. (1) But, if the circumstances do not afford any ground for such a suggestion, then the paramount consideration must be the relevancy of the inquiry to the matter in issue, which is the state of the defendant's mind when he published the statements complained of, and the interrogatories must be held to be legitimate. Here the judge at chambers allowed the interrogatory, and, so far as I can see, the circumstances of the case not only do not countenance, but rather rebut, any suggestion that the interrogatory is put for the purpose of enabling actions to be brought against other persons, and not really for the purpose of supporting the plaintiffs' case on the issue of privilege. The appeal, therefore, in my opinion fails as regards the first interrogatory in question.

The second interrogatory in question is in the following terms: "Give by reference to your books, or otherwise, the names of the companies, firms, and persons to whom the same have been supplied or shewn by or through the defendants or their agents." Now there is one general principle underlying the whole law as to interrogatories, namely, that they must not be of such a nature as to be oppressive, and to exceed the legitimate requirements of the particular occasion. To require of the publishers of a publication like the defendants' that they should go through their books, and by reference thereto, or otherwise, specify all the companies, firms, and persons to whom the publication has been supplied, or shewn by or through the defendants or their agents, on the chance that some person may be discovered in whose case the publication would not be privileged, would be, in my judgment, oppressive; and therefore I think that we should be misusing the jurisdiction given to us in the matter, if under the circumstances we

(1) See *Hope* v. *Brash*, [1897] 2 Q. B. 188, in which case the action was for a libel published in a newspaper.

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were to allow such an interrogatory to be administered. As to the second interrogatory therefore I think the appeal must succeed.

MATHEW L.J. I am of the same opinion. I do not see any reason in this case for thinking that the first interrogatory is put for any other than a legitimate purpose, namely, to rebut the defence of privilege by shewing that the information upon which the defendants published the statements complained of was such that no person could reasonably be supposed to have acted bonâ fide upon it. It is obvious that the best test of the value of information would be the character and position of the persons from whom it was obtained. I have nothing further to add to what the Master of the Rolls has said on this subject.

With regard to the second interrogatory, it appears to me to be obviously oppressive. I see no reason to suppose that it would benefit the plaintiffs to any extent which could countervail the inconvenience which it would occasion to the defendants. In order to answer it the defendants might have to enter into an almost interminable inquiry as to what their various agents might have done in the matter, and there does not appear to me to be any sufficient ground shewn for subjecting them to such an oppressive requirement. I therefore think that this interrogatory should be disallowed.

Appeal allowed in part.

Solicitor for plaintiffs: *A. E. Fenton, for T. A. Needham, Manchester.*

Solicitors for defendants: *Baker, Baker & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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1905
March 20, 21.

LEADBETTER AND OTHERS *v.* MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF ST. MARYLEBONE.

London—Buildings—Party Wall—Building Owner's Notice—Six Months' Limitation—Difference between Building Owner and Adjoining Owner—Reference to Surveyors—Work not begun within Six Months—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90, *sub-ss.* 4, 7; *s.* 91.

The provision of the London Building Act, 1894, s. 90, sub-s. 4, which enacts that a party-wall or structure notice shall not be available for the exercise of any right, unless the work to which the notice relates is begun within six months after the service thereof, does not apply to a case in which, a difference having arisen between the building owner and the adjoining owner with regard to the work to be done under the notice, there is a reference to surveyors under s. 91 of the Act, and their award is not made within six months after the service of the party-wall notice.

APPEAL from an order made by Bucknill J. at chambers refusing an application of the plaintiffs as after mentioned.

The plaintiffs and the defendants were the respective owners of the freehold in adjoining houses, numbered respectively 33 and 34, John Street, in the borough of St. Marylebone, in the county of London. In 1902 the tenant of the plaintiffs' house, being about to rebuild it in a manner which involved the rebuilding of the party wall between the houses, gave notice to the defendants of his intention to do the work under s. 90 of the London Building Act, 1894; and the defendants, as adjoining owners, served upon him a notice under s. 89 of that Act, setting out the requisitions with which they required him to comply. A difference having arisen between the parties in respect to the execution of the works within the meaning of the Act, it was referred under s. 91 to the arbitration of certain surveyors, who, by their award, after deciding as to the dimensions and mode of erection of the party wall, further awarded, inter alia, that the adjoining owners, the defendants, should have a right at any time to raise the wall as they might desire. The building operations were then carried out by the plaintiffs' tenant. In 1904 the defendants proceeded to raise the height

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of the party wall, and began to build upon it, without giving a building owner's party-wall notice to the plaintiffs, who had in the meantime acquired the interest of their before-mentioned tenant, contending that they were entitled to do so under the terms of the award. The plaintiffs thereupon brought an action of trespass against the defendants, claiming an injunction to restrain the defendants from trespassing on or interfering with the party wall without first serving a building owner's notice on the plaintiffs under the London Building Act, 1894. Application was made by the plaintiffs for an interlocutory injunction to Phillimore J. at chambers, who made an order for an interlocutory injunction to restrain the defendants from trespassing on or interfering with the party wall. The defendants appealed to the Court of Appeal, and it was agreed that the hearing of the appeal should be treated as the trial of the action. The Court of Appeal on August 6, 1904, dismissed the appeal, and ordered that judgment in the action should be entered for the plaintiffs against the defendants for an injunction restraining the defendants from trespassing on the premises No. 33, John Street, and from trespassing upon and interfering with or damaging the party wall without giving previous notice, and proceeding under the London Building Act, 1894, with liberty to the plaintiffs to apply in respect of damages, if any. The case is reported [1904] 2 K. B. 893. On August 11, 1904, the defendants served upon the plaintiffs, and upon their lessee of the premises No. 33, John Street, and his sub-lessee, as adjoining owners, a party-wall notice in pursuance of the London Building Act, 1894, s. 90, stating the nature and particulars of the work which the defendants proposed to do in respect of the party wall, and further stating that the defendants had appointed a certain person to act as their surveyor in the matter in respect of any difference which might arise. The plaintiffs and other adjoining owners did not consent to the execution of the works mentioned in the notice, and thereupon a difference arose between the parties under the London Building Act, 1894, s. 90, sub-s. 7. Notice was subsequently given by the defendants to the plaintiffs and other adjoining owners to appoint surveyors on their behalf respectively to settle the

matters in dispute, pursuant to the London Building Act, 1894, s. 91, sub-s. 1. The plaintiffs and other adjoining owners accordingly appointed their surveyors, and the surveyors for the respective parties interested ultimately agreed in the selection of a person to act as the third surveyor under the section. A considerable period of time was consumed in making the arrangements for arbitration under the Act and in discussion between the surveyors of the terms of the awards to be made; and the result was that no award had been made with reference to the matters in difference between the plaintiffs and defendants, and no further work had been done, on February 11, 1905, when the period of six months from the service of the party-wall notice by the defendants had elapsed. The plaintiffs thereupon gave to the surveyor appointed by them notice that they contended that by reason of the provisions of the London Building Act, 1894, s. 90, sub-s. 4, the powers of the arbitrators had lapsed, and their surveyor in consequence declined to take any further part in the arbitration. The plaintiffs then took steps to enforce the judgment in the action. They applied at chambers for, and obtained an order for, a reference to an official referee to assess the amount due to the plaintiffs for damages in the action, and for payment of the same, when assessed, by the defendants to the plaintiffs. They further applied to Bucknill J. at chambers for an order directing the defendants to remove the building erected by them upon the party wall, or, in case they failed or refused to do so, that the plaintiffs might remove the same at the expense of the defendants. The learned judge refused to make such an order; and the plaintiffs thereupon appealed against his decision. It was ultimately admitted during the argument of the appeal by the counsel for the plaintiffs that, there having been no mandatory injunction in the action, they could not insist on an order in the form applied for at chambers; and, at the suggestion of Cozens-Hardy L.J., it was agreed that, in order to determine the question of law raised between the parties, the application should be treated on appeal as if it were one for an attachment or a sequestration against the defendants for disobedience of the injunction granted in the action.

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J. E. Bankes, *K.C.*, and *Poyser*, for the plaintiffs. The effect of s. 90, sub-s. 4, of the London Building Act, 1894, is that, if the work under the party-wall notice is not begun within six months of the service of that notice, it is no longer available. Assuming that, if the defendants had carried through the proceedings under the London Building Act, 1894, s. 91, and an award had been made by the surveyors, and the work had been resumed within the six months after the service of the notice, the defendants would have legalised their action quoad the future, the result of the notice now having become unavailing is that the powers of the arbitrators have lapsed, and the defendants remain trespassers, and are guilty of a breach of the injunction granted in the action. The plaintiffs are not unwilling that the defendants should put themselves right quoad the future by giving a fresh party-wall notice, and so commencing fresh proceedings under the London Building Act, 1894; but, the defendants having been wrong-doers in the first instance, and the plaintiffs being prejudiced by the delay, they contend that they are entitled to treat the defendants as trespassers up to the present time, and to have damages assessed on that footing.

Macmorran, *K.C.*, and *G. A. Scott*, for the defendants. The six months' limitation mentioned in s. 90, sub-s. 4, only applies to a case where, a party-wall notice having been given, the adjoining owner consents thereto. Where there is a difference with regard to the work to be done under the notice, which has to be dealt with by surveyors under s. 91, the provisions of s. 90, sub-s. 4, do not apply. Under s. 91 the surveyors have power to deal with any question as to the time within which the work is to be done. Having regard to the fact that an appeal is given by s. 91 from the award of the surveyors to the county court, or, in certain cases, to the High Court, and that a case may be stated on a point of law for the opinion of the High Court, it is obvious that it might often be impossible to get the difference settled, and to begin the work, before the six months had expired; and it can never have been intended that in such a case the whole of the proceedings should become abortive, if the six months' limit were exceeded.

J. E. Bankes, K.C., for the plaintiffs, in reply. The provision of s. 90, sub-s. 4, is quite general, and there are no expressions in the Act tending to shew that it is not to apply where there is a difference which has to be dealt with under s. 91. The interference with a party wall may be a great nuisance to the owner of the adjoining premises; and the Legislature probably intended to make stringent provisions to prevent the proceedings from being unduly protracted, and a matter of this kind being kept hanging over the head of the adjoining owner indefinitely.

MATHEW L.J. I think that this appeal must be dismissed. It was admitted by the counsel for the plaintiffs that, as matters stood, the plaintiffs were not in a position to insist upon an order such as they applied for at chambers; and it was agreed that the application should, for the purposes of the appeal, be treated as if it were an application for an attachment or a sequestration against the defendants for disobedience of the injunction granted by the former order of this Court. The question, when this case came before the Court of Appeal on a previous occasion, was whether the defendants were justified in building upon the party wall under the award which had been made on the former proceedings under the Act without themselves giving a building owner's party-wall notice under the London Building Act, 1894. It was held that they were not, and they were accordingly restrained from trespassing on, or interfering with, the party wall without previously putting themselves in order by giving such a notice, and taking the proper proceedings under the Act, by which course it was supposed that this unfortunate dispute would be ended. The adjoining owners to whom it was necessary for the defendants to give notice were the plaintiffs, who were the owners of the freehold in the adjoining premises, and their lessee, and his sub-lessee of those premises. The requisite notices were forthwith served upon these parties by the defendants; but a considerable period of time was consumed in making the necessary arrangements for arbitration, and also in consequence of difficulties which appear to have arisen in dealing with the

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matters in difference between the defendants and the several adjoining owners; and it was not until shortly before the expiration of six months from the giving of the party-wall notice to the plaintiffs that the arbitrators were in a position to proceed to make their award with regard to these matters. Before any award was made in respect of the differences between the plaintiffs and the defendants, the period of six months from the giving of the building owner's notice by the defendants expired, and the plaintiffs thereupon gave notice that, the six months having expired, the powers of the arbitrators were at an end. It is argued that the result is that the defendants are placed in the position of having to begin the necessary proceedings under the Act all over again. I think it would be a great hardship if, under the circumstances, and after considerable expense must have been incurred by the defendants in relation to the settlement of the differences between them and the adjoining owners, all the previous proceedings should thus become fruitless; but such, of course, may be the law. In order to see whether that is so, it is necessary to consider the provisions of the London Building Act, 1894, on the subject. It is argued now that the effect of s. 90, sub-s. 4, of the Act is to limit the period during which the powers of the arbitrators in such a case continue to exist, and that, if the work to which the notice relates is not begun within that period, the whole of the arbitration proceedings become abortive, and, therefore, that the defendants must take fresh proceedings under the Act. Sect. 90, sub-s. 4, provides that "a party-wall or structure notice shall not be available for the exercise of any right, unless the work to which the notice relates is begun within six months after the service thereof, and is prosecuted with due diligence." That sub-section appears to me to provide for cases in which a building owner's notice is given with respect to a party wall, and, the adjoining owner consenting thereto, no difference arises between the building owner and the adjoining owner. But another and most important section in reference to this subject is s. 91, which contemplates the case in which, a building owner's notice having been served, differences arise, in which case there is to

be an arbitration by surveyors for the settlement of those differences. I cannot see any indication in the Act that the limit of six months given by s. 90, sub-s. 4, is to apply to such a case. Under s. 91 there may be an appeal to the county court from the award of the surveyors, or in some cases to the High Court, and a point of law may be raised by means of a case stated for the opinion of the High Court. It is obvious that in such a case a period exceeding six months may necessarily elapse before the work can be begun. In my opinion the contention of the plaintiffs with regard to the effect of s. 90, sub-s. 4, is untenable. For these reasons I think the appeal fails.

COZENS-HARDY L.J. I am of the same opinion. I think that Bucknill J. was quite right in dealing with the matter as he did. The application before him appears to have been based on Order XLII., r. 30. But, when the order of the Court of Appeal is looked at, it is plain, in my opinion, that they never intended to grant a mandatory injunction, or to order that the buildings erected by the defendants should be pulled down. Unless the order of the Court of Appeal could be construed as a direction to the defendants to pull their buildings down, with which they had refused to comply, it is clear that an application under Order XLII., r. 30, could not succeed. When that difficulty was pointed out in this Court, counsel agreed that the appeal should be dealt with as if the application were to punish the defendants for disobedience of the injunction by an attachment or a sequestration. That being so, it is necessary to see what were the terms of the injunction granted by the Court of Appeal. It was an injunction to restrain the defendants from trespassing on, or interfering with the party wall, without giving previous notice, and proceeding under the London Building Act, 1894. The defendants did immediately give the requisite notice under that Act. That was followed up, after considerable delay, by the appointment of surveyors under s. 91; but, before any award was made by those surveyors as between the plaintiffs and the defendants, the period of six months from the service of the

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party-wall notice by the defendants expired. It is contended that the effect of the expiration of that period was to render all the previous proceedings nugatory and unavailing, and that the defendants must commence proceedings under the Act de novo. I cannot adopt that as the correct view of the effect of s. 90, sub-s. 4. Certain rights are exercisable by a building owner, who gives a party-wall notice under s. 90, as against an adjoining owner who consents to that notice. It is a very reasonable provision that the building owner who has served such a notice, to which the adjoining owner has consented, should not be at liberty to exercise those rights after allowing a long period of time, say, for instance, two years, to elapse without acting on the notice. But different considerations appear to me to apply to a case where, differences having arisen, further proceedings have to be taken, and surveyors appointed to settle those differences under s. 91. In that case the rights of the parties under the Act would appear to depend not so much on the party-wall notice as on the award made by the surveyors. I cannot think that the intention was that in that case the whole of the proceedings should become nugatory, unless the award could be perfected, which might involve the stating and decision of a case for the High Court on a legal point, within the period of six months from the giving of the party-wall notice. In my view that is not the true effect of the Act. I agree that there has been no breach of the injunction, and therefore the application must be refused.

Appeal dismissed.

Solicitor for plaintiffs: *William Stubbs.*

Solicitors for defendants: *Mackrell, Maton, Godlee & Quincey.*

E. L.

[IN THE COURT OF APPEAL.]

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Feb. 17, 20.

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LEWIN *v.* CIVIL SERVICE SUPPLY ASSOCIATION, LIMITED.

Rating—"House"—"Inhabitant"—"Occupier"—House occupied otherwise than as a Dwelling-house—Parish of St. Paul, Covent Garden—Rector's Rate—12 *Car.* 2, *c.* 37—51 *Geo.* 3, *c. cl.*, *ss.* 1, 2, 3, 6.

Held, that the rector's rate, which is to be levied in the parish of St. Paul, Covent Garden, under the provisions of the Acts 12 Car. 2, c. 37, and 51 Geo. 3, c. cl., is by those Acts imposed only on dwelling-houses, or on houses which, without substantial structural alterations, "are capable of being occupied as such."

The decision to that effect in *Surman* v. *Darley*, (1845) 14 M. & W. 1 followed.

THESE two appeals from decisions of a Divisional Court (Lord Alverstone C.J. and Kennedy J.) raised similar questions, namely, whether certain buildings situate in the parish of St. Paul, Covent Garden, were liable to be rated in respect of the rector's rate in that parish.

This rate was first imposed by the Act 12 Car. 2, c. 37, which is intituled "An Act for making the precinct of Covent Garden parochial." That Act provided (inter alia) that the yearly sum of 250*l.* should from thenceforth be and the same was thereby charged upon the houses of the inhabitants of the parish of St. Paul, Covent Garden (except the house then commonly called Bedford House), for the support and benefit of the rector, curate, clerk, and sextons for the time being of the said parish.

By an Act 51 Geo. 3, c. cl. (local and personal), after a recital of the Act of Charles II., and a recital that, "from the very great advance in price of the articles of necessary consumption, it is expedient that the sum of 250*l.* should be increased," it was enacted (s. 1) that from and after the passing of the Act the charge of 250*l.* "shall cease and determine; and that all and every the clauses, powers, and provisions in the said Act

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contained, so far as the same respect the assessing and compelling payment of the sum of 250*l.* (except as to any arrears of the same sum which shall, at or before the passing of this Act, have become due and payable) shall be and the same are hereby repealed, and declared to be null and void to all intents and purposes whatsoever."

By s. 2 it was provided that, "in lieu of the said sum of 250*l.*, the yearly sum of 520*l.* shall, from the 25th March next before the passing of this Act, be and the same is hereby charged upon all houses within the said parish of St. Paul, Covent Garden, and shall within fourteen days next after the passing of this Act, and for ever after yearly on the 25th March, or within thirty-one days after in every year, be assessed and rated by the churchwardens of the said parish, or any two of them, after a pound-rate, according to the fair yearly rent or improved value of such houses respectively; and every such rate or assessment shall be confirmed and allowed by" two justices; "and all such rates and assessments shall be borne and paid by the respective occupiers of such houses respectively." Power was also given to the churchwardens to assess and raise, in addition to the 520*l.*, "the reasonable expenses of making and collecting every such rate or assessment," and for making good any loss or deficiency which should have arisen from the insolvency of any collector or collectors of the said rates or otherwise.

By s. 3, "if any person or persons liable to pay any of the said rates or assessments shall refuse or neglect to pay the sum or sums of money which shall by the authority and for the purposes of this Act be rated and assessed upon the house or houses in his, her, or their occupation, or upon him, her, or them in respect thereof, after demand made thereof at the premises," power was given to the churchwardens "to levy the same by distress and sale of the goods and chattels of such person or persons."

Sect. 6 empowered the churchwardens, "if they shall think it expedient, to bring or cause to be brought in the names of them, or any two of them, any action or actions of debt, or special action on the case" in any of the superior Courts, "for

all or any of the rates or assessments which they are by this Act respectively authorized to make and assess; in which action or actions it shall be sufficient for the plaintiffs to declare that the defendant is indebted to the plaintiffs in such a sum of money as the plaintiffs shall suppose to be due."

By s. 21, "This Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, by all judges, justices, and others, without being specially pleaded."

The plaintiffs in both actions, which were brought in the Westminster County Court, were the churchwardens of the parish, and the actions were brought to enforce payment of the rate by the defendants respectively.

The defendant End was a fruit merchant, who occupied for the purposes of his business the buildings known as No. 11, York Street, and Nos. 28 and 30, Wellington Street. The former street ran east and west; the latter ran north and south, and the defendant's buildings fronted north on York Street and east on Wellington Street. The three houses were originally separate tenements, and were formerly occupied as dwelling-houses. For the purposes of the defendant's business the ground-floor of the three houses had been thrown into one, openings having been made through the walls which separated the houses. The ground-floor and the basements were used as a fruit warehouse and store. The upper floors of the three houses were sublet to different tenants, and were occupied by them as offices. No one—not even a caretaker—lived or slept in any of the houses. There was a night watchman on the ground-floor, who received goods which were delivered there during the night. There was no kitchen in any of the houses.

The defendants in the second action occupied a large building, in which they carried on the business of their stores, where goods of various kinds were kept and sold to their shareholders and members. This building stood on the site of some old dwelling-houses which had been pulled down nearly twenty years ago, when the defendants' stores were built. No one slept at the stores and there was no accommodation for that purpose. The persons employed at the stores came at 9 A.M. and left at 6.30 P.M., except on Saturdays, when they left at

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2.30 P.M. There was no one there at night, except two watchmen, who were stationed on the staircase, boxes being placed there for their convenience. They had no access to the rooms, but they could inspect them by means of gratings in the doors, which were locked at night. There was a refreshment room, with which a kitchen was connected, for the use of the customers. The waitresses were allowed to have their lunch in the refreshment room before it was opened to the customers, but the other assistants had to go out for their meals.

In the church of St. Paul a mid-day religious service was during a considerable part of the year held for the benefit of shop assistants.

The judge of the county court, on the authority of the decision of the Court of Exchequer in *Surman* v. *Darley* (1), held that neither of the defendants was liable to the rate, and this decision was affirmed by the Divisional Court.

In *Surman* v. *Darley* (1) the question was, whether Covent Garden Theatre was liable to be rated under the above Acts, and the Court of Exchequer held that it was not.

In his judgment in that case Pollock C.B. said (2): "We all think that the term 'house' primâ facie means a dwelling-house. . . . It seems to me that this Act was intended to apply only to dwelling-houses occupied by individuals as such, and that such buildings as warehouses and counting-houses were not included in it. Neither can we construe it to extend to other buildings which, strictly speaking, are not houses, though popularly called so."

And Alderson B. said: "It" (the second Act) "clearly meant to impose the charge only on dwelling-houses, or, at all events, on those which are capable of being occupied as such. The first Act is a key to the second, and shews that the parties who were to be liable to the rate were those who would derive benefit from the services of the rector, curate, clerk, or sexton."

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Macmorran, K.C., and *Clarke Hall*, for the plaintiffs. It is submitted that the houses rateable under these Acts are not

(1) 14 M. & W. 181. (2) 14 M. & W. at p. 185.

only dwelling-houses. The Act of George III. applies to "all houses within the parish." The Act of Charles II. imposes the charge on the "houses of the inhabitants" of the parish—that is, houses intended in some sense for human habitation or occupation, but not necessarily dwelling-houses. The learned county court judge decided the case on the authority of *Surman* v. *Darley* (1), and so did the Divisional Court. In that case the Court of Exchequer held that Covent Garden Theatre was not rateable under these Acts. Pollock C.B., no doubt, said (2) that the Act applied only to dwelling-houses; but Alderson B. said (2) that the Act imposed the charge "only on dwelling-houses, or, at all events, on those which are capable of being occupied as such." It is submitted that the houses occupied by the defendant End are "capable of being occupied" as dwelling-houses. Very slight alterations would restore the houses to the condition of dwelling-houses. The word "house" and the word "inhabitant" may have different meanings according to circumstances: *Wilson* v. *Churchwardens of Sunderland* (3); *Daniel* v. *Coulsting* (4); *Wright* v. *Ingle*. (5)

In the latter case it was held that the word "house" included "every building which is capable of being used as a human habitation." There is no reason for restricting the meaning of the word "house" in those Acts. And these houses may be properly said to be "inhabited" by the defendant and his tenants. In *Lewin* v. *Newnes, Ld.* (6), a case under these same Acts, it was held that houses in this parish which were used as offices, warehouses, store-rooms, and counting-houses, some being occupied by caretakers and their families, who lived and slept there, were liable to this rate. It is submitted that the liability to the rate cannot depend upon whether a caretaker sleeps on the premises.

[They also referred to *Stephenson* v. *Langston* (7); Prideaux's Churchwardens' Guide, 16th ed. p. 7.]

John Sanderson and *Walter Frampton*, for the defendant

(1) 14 M. & W. 181.
(2) 14 M. & W. at p. 185.
(3) (1864) 34 L. J. (M.C.) 90.
(4) (1845) 7 Man. & G. 122.
(5) (1885) 16 Q. B. D. 379.
(6) (1904) 90 L. T. 160.
(7) (1804) 1 Hagg. Con. 379.

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End. It is submitted that the principle of the decision in *Surman* v. *Darley* (1) was right, and that the Court will not now depart from it. And the facts of the present case are such as to bring it within that principle. *Lewin* v. *Newnes, Ld.* (2), entirely differed in its facts from the present case. In *Riley* v. *Read* (3) it was held that a building used in part as a club and in part as an auctioneer's office, and in which no one slept, was not an "inhabited dwelling-house" so as to be subject to inhabited house duty. In *Nunn* v. *Denton* (4) it was held that a building, the lower part of which was used as a cow-house and stable, an upper room being used as a dwelling-place, was properly described as a "house" for the purpose of qualifying for a vote in the election of a member of Parliament. And Tindal C.J. treated sleeping in the building at night as the test. "Capable of being used" as a dwelling-house must mean capable of being so used at the time when the rate is assessed. As was said by Alderson B. in *Surman* v. *Darley* (5), the Act of Charles II. "shews that the parties who were to be liable to the rate were those who would derive benefit from the services of the rector, curate, clerk, or sexton." Persons who come only for the purpose of daily business and who are not in a house on Sunday do not derive any benefit of that kind. A man who wished to be married at the parish church by banns must "reside" in the parish in the ordinary sense of the word.

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Macmorran, K.C., and *Clarke Hall*, for the plaintiffs. The facts of this case are no doubt quite different from those in *Lewin* v. *End.* The Civil Service Stores were never a dwelling-house; they were built for the purpose of being used as "stores"; and the question is whether premises which are used for business purposes only can escape the payment of this rate. The rate is imposed on the inhabitants, and there is no reason why business premises should escape the payment. The appeal is really brought in the interest of the other

(1) 14 M. & W. 181.
(2) 90 L. T. 160.
(3) (1879) 4 Ex. D. 100.
(4) (1844) 7 Man. & G. 66; 66 R. R. 680.
(5) 14 M. & W. at p. 185.

occupiers in the parish. A fixed amount has to be raised by means of this rate, and if some premises are exempt the charge on the others will be heavier. The stores are structurally capable of being occupied as a dwelling-house. And, as to the argument about the services of the rector, special mid-day services are held in this parish church for the benefit of clerks and shop assistants.

Danckwerts, K.C., *Morton Smith*, and *Henn Collins*, for the Civil Service Supply Association. The decision in *Surman* v. *Darley* (1) is just sixty years old, and the Court will not now depart from the principle there laid down: *Merry* v. *Nickalls*. (2)

The meaning of the word "house" may, no doubt, vary according to circumstances, but there is no good reason for departing from the decision in *Surman* v. *Darley*. (1)

[They referred also to *Reg.* v. *Christopherson* (3); *Rex* v. *Inhabitants of North Curry*. (4)

They were stopped by the Court.]

Clarke Hall, in reply in both cases. This Court can overrule *Surman* v. *Darley*. (1) But the passages in the judgments in that case which are relied on by the respondents are really only obiter dicta. Covent Garden Theatre was clearly not a house.

VAUGHAN WILLIAMS L.J. I do not see my way to depart from the decision of the Court of Exchequer in *Surman* v. *Darley*. (1) In that case it was decided that Covent Garden Theatre was not liable to the rate because it was not a dwelling-house. It is beyond argument that neither of the buildings now in question is in fact at present used as a dwelling-house. No one, I think, can doubt that if a covenant had been entered into by the tenants of these buildings that they would not use the premises otherwise than as dwelling-houses there would have been a breach of that covenant in each case. The Court of Exchequer did, I think, say that a house which in structure was capable of being used as a dwelling-house did come within the meaning of the word "house" in these

(1) 14 M. & W. 181.
(2) (1872) L. R. 7 Ch. 733, at p. 750.
(3) (1885) 16 Q. B. D. 7.
(4) (1825) 4 B. & C. 953.

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two Acts. But, though they did say that, I think that a house "capable of being used as a dwelling-house" means "capable in its present structural condition of being so used." In my judgment neither the Civil Service Stores nor Mr. End's building is, having regard to the evidence, a house in respect of which it could be truly said that it is "capable of being used as a dwelling-house." In these circumstances I think that neither of these buildings is rateable, and the appeal must be dismissed.

ROMER L.J. I agree. In my opinion both these cases are governed by *Surman* v. *Darley*. (1) In order that the present appeals should succeed we must dissent from the ratio decidendi of that case. That decision is now just sixty years old. It has never yet been dissented from, but, on the contrary, it has been followed continuously up to the present time. That being so, I do not think that this Court after so long a lapse of time ought to overrule or depart from that decision. On the facts it appears to me that neither of these buildings is being used as a dwelling-house. No one dwells there. As regards the defendant End's building, it is not merely temporarily being used otherwise than as a dwelling-house, nor could it be used as a dwelling-house without substantial structural alterations. That being so, I think on the facts both cases fall within the decision in *Surman* v. *Darley*. (1)

STIRLING L.J. I am of the same opinion. In my judgment we are not at liberty at this time to depart from the principle of the decision in *Surman* v. *Darley*. (1) It was laid down by the Court in that case that these Acts were meant to apply only to buildings which were substantially dwelling-houses. The appellants have relied on the language of Alderson B., who said (2) that the Act "clearly meant to impose the charge only on dwelling-houses, or, at all events, on those which are capable of being occupied as such." It was said that both the buildings now in question, though they cannot be said to be at the present time dwelling-houses, are "capable of being

(1) 14 M. & W. 181. (2) 14 M. & W. at p. 185.

occupied as such." I am unable to differ from the findings of the learned county court judge in this respect. In my opinion, by the words "capable of being occupied as such," the learned Baron meant buildings which, without substantial structural alteration, are capable of being occupied as dwelling-houses. In both the cases now before us it seems to me that, in order that the buildings should be capable of being occupied as dwelling-houses, substantial structural alterations would be required. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Bartlett & Large; Harry Wilson; Tathams & Pym.*

W. L. C.

[IN THE COURT OF APPEAL.]

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EMBIRICOS *v.* ANGLO-AUSTRIAN BANK.

Bill of Exchange — Cheque — Cheque stolen Abroad — Forged Indorsement — Transfer for Value in Foreign Country — Conflict of Laws — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 24, 72.

The rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of bills of exchange or cheques by indorsement.

Alcock v. *Smith*, [1892] 1 Ch. 238, followed, as being a decision to that effect.

Per Vaughan Williams L.J.: *Semble*, that the indorsement of a bill of exchange in a foreign country, valid under the foreign law but invalid under English law, would be effectual to give the indorsee a good title to the bill as against the drawer or acceptor.

Sect. 24 of the Bills of Exchange Act, 1882, does not apply to an indorsement of a bill of exchange abroad. That section is only declaratory of English law, and does not control the general rule of international law.

Lacave v. *Crédit Lyonnais*, [1897] 1 Q. B. 148, distinguished.

A cheque on a London bank was drawn in Roumania in favour of the plaintiffs, who the same day specially indorsed it to a firm in London, and placed it, with a letter, in an envelope addressed to that firm in London. The cheque was stolen from the envelope by one of the plaintiffs' clerks. The cheque was presented at a bank in Vienna by a person who desired that it might be cashed. It then bore an indorsement, which purported

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to be that of the London firm, but which was in fact forged. The Vienna bank, acting in good faith and without negligence, cashed the cheque, and then indorsed it to the defendants, bankers in London, and sent it to them by post. The defendants cashed it at the London bank on which it was drawn. The plaintiffs sued the defendants for damages for the wrongful conversion of the cheque. By the Austrian law the defendants had a good title to the cheque as bonâ fide holders for value without gross negligence:—

Held, that *Alcock* v. *Smith*, [1892] 1 Ch. 238, applied, and that the Austrian law must prevail, the transfer of the cheque having been made in that country.

Decision of Walton J., [1904] 2 K. B. 870, affirmed.

APPEAL from the decision of Walton J. (1)

The action was brought by Messrs. L. & M. Embiricos against the Anglo-Austrian Bank to recover damages for the wrongful conversion of a cheque. On March 6, 1903, a Roumanian bank drew a cheque at Braila, in Roumania, on a London bank payable to the plaintiffs or order. The same day the plaintiffs at Braila specially indorsed the cheque to G. Embiricos & Co., a London firm, and wrote to them a letter which, with the cheque, the plaintiffs placed in an envelope addressed to G. Embiricos & Co. in London. The cheque was stolen from the envelope by a clerk of the plaintiffs. On March 9, 1903, the cheque was presented at the bank of Messrs. Schelhammer & Schatterer, in Vienna, by a person who desired that it might be cashed. It then bore the indorsement G. Embiricos & Co., in addition to the special indorsement to that firm by the plaintiffs. The indorsements were apparently regular and in order, but that of G. Embiricos & Co. was in fact a forgery, though Messrs. Schelhammer & Schatterer were ignorant of the forgery. They telegraphed to the Roumanian bank, and, having ascertained from them that the cheque was in order, they cashed it, and on the same day they indorsed it to the defendants and posted it to them in London, where the defendants cashed it at the bank on which it was drawn.

According to an affidavit made as to the Austrian law by a doctor of law of the University of Vienna, "the holder of a

(1) [1904] 2 K. B. 870.

cheque which he has bought bonâ fide without gross negligence and for value is identified as the proprietor of the cheque, and entitled to the proceeds thereof against all the world, notwithstanding that the cheque has been previously stolen, and notwithstanding that the indorsement has been forged."

Walton J. gave judgment for the defendants. He held, upon the authority of *Alcock* v. *Smith* (1), that the transfer of the cheque in Vienna was governed by Austrian law, and gave the Vienna bank a good title to the cheque, which title they transferred to the defendants.

The plaintiffs appealed.

J. E. Bankes, K.C., and *Leslie De Gruyther*, for the plaintiffs. In the case of a bill of exchange or a promissory note or a cheque payable in England, the right to enforce payment must be governed by the law of England, and a person who brings over from abroad a document of this kind which is governed by the law of England to the extent of the obligations of the drawee, if he seeks to use it as a negotiable instrument, cannot be heard to say that the law of England as regards that user does not apply: *Lacave* v. *Crédit Lyonnais*. (2) A distinction must be drawn between the title to the document and the power to enforce payment. The judgment of Romer J. in *Alcock* v. *Smith* (1) is opposed to this contention; but the Court of Appeal, in affirming that judgment, proceeded on different grounds; and that case is distinguishable from the present, because there there was no question of a forged indorsement.

Sect. 72 of the Bills of Exchange Act, 1882, provides that, subject to the provisions of the Act, the interpretation of the indorsement of a bill is determined by the law of the place where the contract is made (3); but that must be read

(1) [1892] 1 Ch. 238.

(2) [1897] 1 Q. B. 148.

(3) Sect. 24: "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it

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in connection with s. 24, which says that under no circumstances will the law recognise a forged instrument. Therefore the indorsement referred to in s. 72 must mean a genuine indorsement.

[They also cited *Bobbett* v. *Pinkett* (1); *Lebel* v. *Tucker* (2); *In re Marseilles Extension Railway and Land Co.* (3); *De la Chaumette* v. *Bank of England* (4); *Robertson* v. *Burdekin*. (5)]

Cohen, K.C., and *Maurice Hill*, for the defendants. The sole question is whether the defendants have wrongfully converted the cheque to their own use. There was no wrongful conversion as in *Arnold* v. *Cheque Bank*. (6) The question whether there was a wrongful conversion by the defendants depends upon whether at the time of the conversion the property in the cheque was in the plaintiffs. It is submitted that at the time of the conversion the plaintiffs had lost their property in the cheque. Under the Austrian law the Vienna bank as purchasers for value without negligence acquired a good title to the cheque by the indorsement to them, notwith-

is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority."

Sect. 72: "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made. Provided that—(*a*) where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; (*b*) where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. (2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom."

(1) (1876) 1 Ex. D. 368.

(2) (1867) L. R. 3 Q. B. 77.

(3) (1885) 30 Ch. D. 598.

(4) (1831) 2 B. & Ad. 385; 36 R. R. 599.

(5) (1843) 6 Dunlop, 17.

(6) (1876) 1 C. P. D. 578.

standing that it was forged, and that good title they passed on to the defendants. It is contended that the ordinary rule of international law—that the transfer of a movable chattel is regulated by the law of the country in which the transfer takes place: vide Dicey's Conflict of Laws, r. 140, p. 530—applies equally to negotiable instruments, and indeed applies to them a fortiori. And *Alcock* v. *Smith* (1) is an authority to that effect. This was distinctly so laid down by Romer J., and his decision was affirmed by the Court of Appeal.

As regards movable chattels, the rule was recognised in *Cammell* v. *Sewell* (2); *Castrique* v. *Imrie* (3); *Hooper* v. *Gumm.* (4) An indorsement may give the indorsee of a bill of exchange a better title than the indorsee has: *Sturtevant* v. *Ford.* (5) It is submitted that the principle laid down in *Cammell* v. *Sewell* (2) is of universal application; a good title acquired in a foreign country to movable or to negotiable instruments by the law of that country will be recognised in every other civilised country.

[VAUGHAN WILLIAMS L.J. referred to *Phillips* v. *Warren* (6); *Emmett* v. *Tottenham.* (7)]

It is contended that ss. 24 and 72 of the Bills of Exchange Act, 1882, do not affect the present question.

In re Marseilles, &c., Land Co. (8) does not establish the proposition for which it was cited. There the indorsement was bad according to French law, but good according to English law, and Pearson J. held that the bill must be treated, as between the drawer and his indorsee and the acceptors, as an English bill, and therefore the indorsement was valid. *Robertson* v. *Burdekin* (9) does not affect the present case. Because a transfer valid in one country is effectual in every other country, it does not follow that a transfer which is invalid in the country in which it is made is effectual elsewhere.

[VAUGHAN WILLIAMS L.J. referred to *Lebel* v. *Tucker.* (10)]

(1) [1892] 1 Ch. 238, at pp. 255, 256.
(2) (1860) 5 H. & N. 728, 744.
(3) (1870) L. R. 4 H. L. 414.
(4) (1867) L. R. 2 Ch. 282, 289.
(5) (1842) 4 Man. & G. 101, 106.
(6) (1845) 14 M. & W. 379.
(7) (1853) 8 Ex. 884.
(8) 30 Ch. D. 598.
(9) 6 Dunlop, 17.
(10) L. R. 3 Q. B. 77.

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That decision is not binding on this Court. But it does not really affect the present case, for there the action was by an indorsee of a bill against the acceptor.

[ROMER L.J. The decision in *In re Marseilles, &c., Land Co.* (1) might perhaps be supported on the ground of estoppel.]

The defendants do not claim through the forged indorsement, but through the Vienna bank, who had acquired a good title to the cheque: *Jeffreys* v. *Boosey*. (2)

In *Lacave* v. *Crédit Lyonnais* (3) the defendants had not acquired a title to the cheque; it was sent to them for collection. It was assumed in the judgment that a transfer valid in France would be recognised in England. When the London bank dealt with the cheque the Paris bank had acquired no title to it; there had been no transfer of the property from the true owner. *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris* (4) is also distinguishable from the present case.

Leslie De Gruyther, in reply. If the appellants are right, the proviso to sub-s. 2 of s. 72 of the Bills of Exchange Act, 1882, has no meaning. There can be no title to the proceeds of a bill of exchange unless there would be a title to them as against the acceptor. If this cheque had been an ordinary bill of exchange payable in England, and the acceptor had refused to pay it, the holders could not have maintained an action against him. By s. 73 of the Bills of Exchange Act, 1882, "the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

[VAUGHAN WILLIAMS L.J. referred to *Bradlaugh* v. *De Rin*. (5)]

Cur. adv. vult.

Feb. 10. VAUGHAN WILLIAMS L.J. read a judgment in which, after stating the facts as above, he continued:— Walton J. decided the case in favour of the defendants on the ground that, by the transfer of the cheque to the Vienna bank,

(1) 30 Ch. D. 598.
(2) (1854) 4 H. L. C. 815.
(3) [1897] 1 Q. B. 148.
(4) [1894] 2 Q. B. 157.
(5) (1870) L. R. 5 C. P. 473.

a good title to the cheque, which the English Court was bound to recognise, passed to the Vienna bank, and that that bank gave an equally good title to the defendants who, when they presented the cheque for payment to the bank on which it was drawn, were dealing with their own property and not with the plaintiffs' property. He pointed out that the only question in this action is between the original payees and the subsequent holders of the cheque, who derived their title to the cheque through an indorsement which had been forged. And that, inasmuch as under the English law no title could be made under a forged indorsement, but under the Austrian law the bonâ fide holder of a cheque, for which he has given value in ignorance of any flaw in the title of the transferor, is entitled to the cheque, although it has been previously stolen and the indorsements upon it have been forged, it became necessary to decide whether the validity of the transfer of this cheque ought to be governed by Austrian or by English law. Walton J. held that the question of the validity of the transfer ought to be governed by Austrian law, first, because it was decided by Romer J., and on appeal by the Court of Appeal in *Alcock* v. *Smith* (1), that the ordinary rule as to the transfer of chattels which is thus stated in rule 140 of Dicey's Conflict of Laws, that "Assignment of a movable which can be touched (goods) giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (lex situs) is valid," applies to a bill of exchange, and, I suppose, to any negotiable instrument; and Walton J. also seemed to be of opinion that his judgment could be justified by the words of s. 72 of the Bills of Exchange Act, 1882. For the learned judge said that if the "interpretation" of the indorsement means the legal effect of the transfer by indorsement, it would cover this case.

I think that the view taken by Walton J. of the effect of the decision in *Alcock* v. *Smith* (1), that the rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases

(1) [1892] 1 Ch. 238.

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where the transfer is by indorsement, is right; although in the case of *Alcock* v. *Smith* (1) the transfer was not by indorsement, but by process of law in the shape of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by the payee against an indorsee, who claims under a forged indorsement giving him a good title in the country where the indorsement was made.

But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby. I do not think that *Alcock* v. *Smith* (1) decides this question; on the contrary, it seems to me that the judgments of Romer J. and the Court of Appeal both disclaim so doing; and, further, it seems to me that the law as laid down by Pearson J. in *In re Marseilles, &c., Land Co.* (2) and by Lush J. in *Lebel* v. *Tucker* (3) is, in effect, authority to the contrary. At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognised by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract. If the contract of the drawer of a cheque or acceptor of a bill were limited to payment on indorsements valid by the English local law an argument might be raised that, even though the

(1) [1892] 1 Ch. 238. (2) 30 Ch. D. 598.
(3) L. R. 3 Q. B. 77, 83.

indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign indorsement, yet he would be guilty of a conversion if he used a negotiable instrument to the possession of which he was entitled for the purpose of obtaining and did obtain payment from an original party to the negotiable instrument from whom he could not have recovered by process of law. User of a chattel by a person entitled to possession in such a manner would perhaps give a right of action for money had and received.

I, however, have come to the conclusion that as between the payees and these indorsees there is no cause of action for conversion, and that the judgment of Walton J. must be affirmed.

It is to be observed that our decision in the present case does not increase the liability of the bank upon which the cheque was drawn and which paid the cheque. I wish to add that I am not satisfied that, having regard to the terms of sub-s. 2 of s. 72 of the Bills of Exchange Act, 1882, that section is conclusive of the present case, and I do not think that s. 24 governs the case of an indorsement abroad.

ROMER L.J. I have come to the same conclusion.

The only question is one of conversion—Did the defendants convert the property of the plaintiffs? Now, if the plaintiffs when they brought this action had no title to the cheque in question as against the defendants, the action must clearly fail. The defendants, by the foreign firm through whom they claim, did acquire a good title to the cheque as against the plaintiffs, if the Austrian law applied. The only question, therefore, is whether the Austrian law did apply.

The plaintiffs contend that it did not, on the ground that bills of exchange and cheques are wholly outside the general principle of private international law which gives effect to a title acquired by transfer abroad by the law of the country in which the transfer took place. I think that contention is erroneous for the reasons which were given by me in *Alcock* v. *Smith* (1), and which were, I think, approved by the Court of

(1) [1892] 1 Ch. 238.

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Romer L.J.

Appeal in that case; and, on further consideration, I see no reason, having regard to the authorities as they stand, to depart from the opinion which I then expressed. Certainly no subsequent case has thrown any doubt upon the decision which I then gave. *Lacave* v. *Crédit Lyonnais* (1) certainly did not; on the contrary, it appears to me to recognise the general principle which formed the basis of my judgment in *Alcock* v. *Smith*. (2) Of course, it may well be that by reason of some special English enactment or law the English Courts might be compelled not to recognise the application of the general principle of international law in special cases brought before them for decision; but I know of no English law or enactment which obliges the English Courts, in such a case as the present, to refuse to give effect to the defendants' title. Sect. 72 of the Bills of Exchange Act, 1882, which codifies the law relating to bills of exchange, cheques, and promissory notes, certainly does not. On the contrary, that section at any rate recognises those general principles, and in particular in sub-s. 2, which says that, "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made." The proviso to that sub-section—"That where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom"—does not touch the present case.

The only other section to which I need refer is s. 24. That is only a statement of the general English law—local, therefore, for the purpose of the present case—and has not, in my opinion, the intention or effect of controlling the operation of private international law in such a case as the present.

For these reasons I think the appeal fails.

STIRLING L.J. I am of the same opinion. I agree with the judgment of Walton J. and with what has been said by my learned brethren, subject only to this—that, as at present advised, and reserving to myself full liberty to reconsider the

(1) [1897] 1 Q. B. 148. (2) [1892] 1 Ch. 238.

question if it should arise hereafter, I attach more weight to s. 72, sub-s. 2, of the Bills of Exchange Act than I understand that they do.

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Stirling L.J.

And as regards *Lacave* v. *Crédit Lyonnais* (1), it does not appear to me to apply to the present case, because, as I understand the facts, the cheque which was the subject of that action did not come into the hands of a "holder in due course" within the meaning of s. 29 of the Bills of Exchange Act—that is, into the hands of a purchaser for value who, without notice of the defect, acquired a title to the cheque by the foreign law.

Appeal dismissed.

Solicitors: *Downing, Handcock, Middleton & Lewis; Bircham & Co.*

W. L. C.

YOUNG *v.* THE NAVAL, MILITARY, AND CIVIL SERVICE CO-OPERATIVE SOCIETY OF SOUTH AFRICA, LIMITED.

1905 *Feb.* 16, 21.

Company—Articles—Indemnity Clause—Director's Remuneration—Travelling Expenses to and from Board Meetings—Directors acting Ultra Vires—Liability for Payments to Co-director.

Directors who are remunerated for their services are not entitled, in the absence of a resolution of the company or a provision in the articles, to be paid out of the assets of the company their travelling expenses incurred in attending board meetings.

One of the articles of a limited company provided for the payment of 200*l.* a year to each director "by way of remuneration for his services"; another article declared that no director should vote on any matter in which he was interested; and a further article provided that every director and other officer should be indemnified by the company against, and it should be the duty of the directors out of the funds of the company to pay, all costs and expenses which any officer of the company might incur in the discharge of his duties.

In April, 1902, A. was elected a director of the company. In May, 1902, the directors passed a resolution that all reasonable travelling expenses should be reimbursed to the directors from time to time. At the date of his election A. was residing in the West of England, and

(1) [1897] 1 Q. B. 148.

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remained so resident until his resignation in January, 1903, and during his directorship was paid out of the company's assets his travelling expenses to and from London incurred in attending the board meetings :—

Held, that the resolution was ultra vires the directors, and that A. must refund to the company the moneys paid him for his travelling expenses whilst a director:

But *held*, following *Cullerne* v. *London and Suburban, &c., Building Society*, (1890) 25 Q. B. D. 485, that A. was not personally liable for the sums paid to his co-directors for their travelling expenses, except to the extent that he had signed cheques for that purpose.

THIS was an action tried by Farwell J., sitting as an additional judge of the King's Bench Division.

The defendant company were incorporated on April 24, 1902, under the Companies Acts, 1862 to 1890, with memorandum and articles of association, and the material articles were as follows :—

Art. 91 provided for the payment of 200*l.* a year to each director "by way of remuneration for his services."

Art. 92 : "If any director being willing shall be called upon to perform extra services or to make any special exertions in going abroad or otherwise for the purposes of the company, the company shall remunerate such director either by a fixed sum or by a percentage of profits or otherwise as may be determined by the directors, and such remuneration may be either in addition to or in substitution for any remuneration he would otherwise be entitled to."

Art. 93 provided that the business of the company should be managed by the directors, who might exercise all such powers of the company and do on behalf of the company all such acts as might be exercised and done by the company, and as were not by the statutes or by the articles required to be exercised and done by the company in general meeting.

Art. 105 declared that no director should vote in respect of any contract or arrangement entered into by or on behalf of the company in which such director should be in any way interested (other than the agreement mentioned in the memorandum of association, or any contract by or on behalf of the company to give to the directors or any of them any security by way of indemnity).

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Art. 116 provided that two directors should form a quorum for the despatch of business.

Art. 161: "Every director, manager, secretary, and other officer or servant of the company shall be indemnified by the company against, and it shall be the duty of the directors out of the funds of the company to pay, all costs, losses, and expenses which any such officer or servant may incur or become liable to by reason of any contract entered into, or act or deed done by him as such officer or servant, or in any way in the discharge of his duties.

On April 25, 1902, the plaintiff was elected one of the first directors of the company by the subscribers to the memorandum of association. The registered offices of the company were in London.

At a board meeting held at the company's office on May 13, 1902, at which the plaintiff and the other four directors of the company were present, the following resolution was passed: "Resolved, that all reasonable travelling expenses be reimbursed to the directors from time to time."

During the year 1902 the plaintiff, who during that time resided either at Torpoint in Cornwall or at Totnes in Devon, was summoned to and attended numerous board meetings in London, several of them being special meetings, and was paid from time to time his travelling expenses to and from London (including hotel charges), and also received payments on account of his remuneration as a director. The fact that the plaintiff was resident in the West of England at the time he was elected a director was known to the company, and it also appeared in the prospectus issued by the company. The plaintiff resigned his directorship on January 1, 1903, and at that date there was due to him a sum of 37*l.* 14*s.* 4*d.*, being the balance of his remuneration as a director for the year 1902, and a sum of 4*l.* 2*s.* 6*d.* for his travelling expenses on the occasion of his last attendance at the board in December, 1902, and he brought this action to obtain payment of those two sums.

The company by their defence alleged that the resolution of May 13, 1902, was ultra vires the directors, and they counter-

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claimed for repayment by the plaintiff of 114*l.* 2*s.*, the amount paid him for travelling expenses during 1902, and also of the sums paid for travelling expenses to two of the other directors during the same period. Of these two directors, one was abroad, and the other, Colonel Peile, had died leaving no estate.

It appeared from the evidence that the plaintiff during his directorship was aware that his co-directors were receiving their travelling expenses, and had in two instances signed cheques amounting to 10*l.* for Colonel Peile's travelling expenses. But it was conceded that the plaintiff had acted honestly in all that he did and was entitled to the 37*l.* 14*s.* 4*d.*, and the arguments were confined to the question of the travelling expenses.

Clauson, for the plaintiff. There is no authority directly in point; but it is submitted that under art. 161 and on general principles the plaintiff is entitled to his travelling expenses. In *Ex parte Joyner* (1) it was held that assignees in bankruptcy were entitled to the expenses of journeys solely and properly undertaken for the benefit of the estate; and in *Attorney-General* v. *Norwich Corporation* (2) the Lord Chancellor said: "I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments, required to meet those expenses, out of the funds in their hands belonging to the trust." Under s. 24 of the Trustee Act, 1893, trustees are entitled to pay themselves out of the trust premises all their expenses. Directors are in a sense trustees of the company: *In re Lands Allotment Co.* (3); and under the circumstances it is reasonable that these travelling expenses should be paid. It is really a question of fact in each case. Further, if the resolution of May 13 had been passed by the company, these payments would be good. Here, under

(1) (1832) 2 Mont. & Ayr. 1. (2) (1837) 2 My. & Cr. 406, 424; 44 R. R. 143.
(3) [1894] 1 Ch. 616.

art. 93, the directors can exercise all the powers of the company, and the resolution is not necessarily ultra vires. At any rate, the plaintiff is not liable for the acts of his co-directors under the resolution, except it may be to the extent that he signed cheques for Colonel Peile: *Cullerne* v. *London and Suburban General Permanent Building Society* (1); *Hirsche* v. *Sims* (2); *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (3); *Dovey* v. *Cory*. (4)

Upjohn, K.C., *Cozens-Hardy*, and *Park Goff*, for the company. It is not disputed that the resolution would not be ultra vires the company, but directors cannot pay themselves or each other out of the company's assets unless authorized so to do by the company or the articles: *In re George Newman & Co.* (5) Here, arts. 91 and 92 are the only ones that deal with the remuneration of the directors. It may be that under art. 92 a director could be paid his travelling expenses when engaged in special business for the company on a special occasion, but that is not this case. Art. 161 only states the general law of indemnity, and the difference between a director and a trustee is this: a trustee, wherever he is, is a trustee. But a director is a director and not always a trustee, except when exercising his duties and powers as a director, and he does not act as a director until he gets to the board meeting. Whatever may be the position of an unremunerated director, the plaintiff was under art. 91 a paid servant of the company, and it was his duty to go to the place where his services were required, and he cannot claim his out of pocket expenses incurred in going to that place. Further, under art. 105 the resolution was ultra vires the directors. They were all parties to it, and they were voting a benefit to themselves. If these payments are allowed, it will be impossible to distinguish every case in which a director leaves his house to attend a board meeting. The mere receipt of a notice to attend the board would entitle a director to charge his out of pocket expenses from the time he left his house.

(1) 25 Q. B. D. 485.
(2) [1894] A. C. 654.
(3) [1899] 2 Ch. 392, 418.
(4) [1901] A. C. 447, 485.
(5) [1895] 1 Ch. 674.

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Clauson, in reply. It is not contended that in every case a director is entitled to his travelling expenses; but it is submitted that on the particular facts of this case the plaintiff was entitled to be paid his travelling expenses from the West of England. The resolution of May 13 was valid. Under the articles two directors form a quorum, and two of the five directors who passed the resolution did not claim and were not paid travelling expenses.

Cur. adv. vult.

Feb. 21. FARWELL J. delivered the following written judgment:—The plaintiff claims a balance of directors' fees, as to which there is now no question, and a small sum for unpaid travelling expenses. The company counter-claim repayment of a larger sum paid to the plaintiff, while he was a director, for travelling and hotel expenses, and they also claim from him payment of travelling expenses paid out of the company's funds, while he was a director, to two other directors. The company was incorporated on April 24, 1902, and the plaintiff was appointed one of the first directors on April 25, 1902. On May 13, 1902, a board meeting was held at which the plaintiff and four other directors were present, when the following, amongst other resolutions, was passed: "That all reasonable travelling expenses be reimbursed to the directors from time to time." Art. 91 provides for the payment of 200*l.* a year to each director "by way of remuneration for his services." Art. 92 provides for special remuneration for directors rendering special services or making special exertions in going abroad or otherwise for the purposes of the company. Art. 93 is the usual article authorizing the directors to exercise the general powers of the company. Art. 105 is the usual article forbidding directors to vote on matters in which they are interested; and art. 161 provides that every director, manager, secretary, and other officer or servant of the company shall be indemnified against, and it shall be the duty of the directors out of the funds of the company to pay, all costs, losses, and expenses which any such officer or servant may incur or become liable to by reason of any contract entered

into or act or deed done by him as such officer or servant or in any way in the discharge of his duties.' The plaintiff resided at Torpoint or at Totnes throughout the time that he was a director, and he attended numerous board meetings and was paid out of the company's funds on each occasion his travelling expenses to and from London, and his hotel expenses while in London. Nineteen receipts altogether, signed by him, have been produced. Some contain details on the back—e.g., that of October 25 has indorsed—"Return fare to and from Totnes, 2*l.* 18*s.* 4*d.* Cab hire to and from station, 3*s.* 6*d.* Hotel charges, 19*s.* 8*d.*" No imputation of any sort is made against the plaintiff. It is not suggested that he had any design of travelling for his own pleasure or living at hotels at the company's expense. He was living in the West of England when he was elected, as was apparent from his address on the prospectus, and had to travel and stay at least one night in town in order to attend the directors' meetings, nor is it contended that such payments as were made are ultra vires the company; but it is said by the company that they are payments which cannot properly be allowed to be made by directors to themselves. I am told that it is not unusual for directors to receive their travelling expenses to and from board meetings out of the company's assets, and I was unwilling to charge the plaintiff in this case, who was obviously honest, and whose whole salary as a director will not cover his travelling expenses, if I could avoid it. But, in my opinion, the law on the subject is plain. "Directors have no right to be paid for their services, and cannot pay themselves or each other or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting": *In re George Newman & Co.* (1) But directors being both agents of and trustees for the company are entitled to be indemnified by the company against all losses and expenses properly sustained and incurred by them in the due performance of their office. They are both trustees and agents—trustees of the company's

(1) [1895] 1 Ch. 674, 686.

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property, with the liabilities of trustees in respect thereof: *In re Lands Allotment Co.* (1); and agents in the transactions which they enter into on behalf of the company: *Great Eastern Ry. Co.* v. *Turner.* (2) Their right to indemnity arises by the implication of a contract from the relation between themselves and the company, and therefore depends on the particular relation existing, for different contracts are implied from different relations. Thus an unpaid trustee is entitled to complete indemnity for all proper expenses incurred by him in the execution of his trust. The reasonable inference from his consent to act as a trustee gratuitously is that he is not to be out of pocket by reason of any proper expenditure in the matter, and I have no doubt of the correctness of the statement in Lewin on Trusts, 11th ed. p. 771, that a trustee will be entitled to be reimbursed his travelling expenses provided they are properly incurred, although the cases cited in the note are not cases of trustees in the usual signification of that term. But different considerations apply to the case of a paid agent or a paid trustee. The question then is, What outlay does his remuneration cover? For, if he is paid on the basis of providing anything at his own expense, he cannot get paid twice over by claiming the costs thereof under his right to indemnity. A paid agent is bound to discharge all the duties incident to his agency for the payment agreed on, and cannot make extra charges for work properly within the scope of his employment as agent. Thus in *Marshall* v. *Parsons* (3) a commission agent for the sale of goods sought to charge, in addition to his commission, for attendances at Somerset House, where the patterns of the goods were inspected by Government officers. Lord Cranworth, then Rolfe B., directed the jury that the question was whether what the plaintiff did was or was not done in the ordinary course of his business as an agent—if the former, he was paid by his commission; if the latter, he was entitled to be paid for them separately. I ask myself, then, if remuneration to a director for his services does or does not include his travelling expenses to and from the board room, and I am of

(1) [1894] 1 Ch. 616, 631. (2) (1872) L. R. 8 Ch. 149, 152.
(3) (1841) 9 C. & P. 656.

opinion that it does. It is the chief part of the ordinary business of a director to attend board meetings. Directors as a rule do not reside at the registered office of the company, where board meetings are usually held. The director lives where he pleases and suits his own convenience. He is paid a fixed sum for attending and advising with his co-directors. His expense in getting there is included in his salary, because it is necessarily incident to the duty undertaken by him that he should be in that particular place. He has undertaken for a fixed sum to do work at particular meetings of himself and others. He cannot perform his obligations without attending, and such attendance, being necessary for, is paid by the remuneration for, such work. The banker, merchant, or solicitor who employs managers or clerks to work for salaries at his bank or offices does not thereby fall under any implied liability to reimburse them their travelling expenses to and from the bank or offices. Mr. Clauson relied on art. 161; but that merely states the general law applicable to agents and trustees, and must be read with the qualification that I have just pointed out. If it were not so, every servant of the company could insist on his travelling expenses to and from the company's works in addition to his wages. The reasons that I have given for holding travelling expenses included in the remuneration apply with even greater force to the hotel expenses. I can see no ground whatever on which they can be successfully claimed. The foregoing observations apply, of course, only to the case before me of travelling and hotel expenses to attend board meetings, and have nothing to do with similar expenses incurred on special occasions for special purposes. Then it is said that the plaintiff is entitled by reason of the special resolution of May 13, 1902; but this resolution is clearly bad. It is general in terms, and purports to give their travelling expenses to all the directors. As I have already held that these expenses are included in their salaries, this resolution is equivalent to voting a present or additional remuneration to themselves and is bad. It might also be put on the ground that the resolution is a nullity under art. 105, as all the directors present were incapacitated from

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voting on it, and it is a single resolution and cannot be split up, as was suggested by Mr. Clauson, into a series of resolutions in which four directors might be taken as voting his expenses to the fifth. Further, the resolution does not mention hotel expenses, and these would be wrongly paid in any event. The company further claims from the plaintiff repayment of the sums paid to two other directors; but there is no evidence that the plaintiff did more than vote in favour of the resolution of May 13, 1902, and had a general knowledge that travelling expenses were being paid, except in the case of 10*l.* to Colonel Peile, the cheques for which he signed. I must hold him liable for this 10*l.*; but with regard to the rest I am of opinion that the case is covered by the decision of the Court of Appeal in *Cullerne* v. *London and Suburban, &c., Building Society* (1), and that the plaintiff is not liable. The result is that the plaintiff recovers in the action 37*l.* 14*s.* 4*d.*, and the defendants recover on the counter-claim 124*l.* 2*s.* Judgment will be entered for the defendants for 86*l.* 7*s.* 8*d.*, and the plaintiff will have the costs of the action on the High Court scale, and the defendants the costs of the counter-claim with set-off.

Solicitor for plaintiff: *S. J. Stammers.*
Solicitors for company: *Cox & Lafone.*

(1) 25 Q. B. D. 485.

H. L. F.

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March 15, 16.

Ship—Bill of Lading—Seaworthiness—Warranty of Fitness to receive Cargo—Duration of Warranty—Incorporation of Harter Act—Effect of, on Obligation of Shipowner.

The warranty, which is primâ facie implied in a contract for the carriage of goods by sea, that the ship is fit for the reception of the cargo, is an absolute warranty; and the incorporation in the bill of lading of the provisions of the Act of Congress known as the Harter Act does not cut down the obligation of the shipowner in that respect to an obligation to exercise due diligence to make the ship fit for that purpose.

The above warranty is a warranty only as to the condition of the ship at the time of loading; it does not continue in force after the goods are once on board.

The defendants received on board their ship for carriage certain goods of the plaintiff. After the goods were on board the ship's engineer had occasion to open a sluice-door in a watertight bulkhead in the lower part of the ship. He shortly afterwards shut the sluice-door, but failed to screw it down so closely as to make it watertight. He subsequently proceeded to fill one of the ballast tanks, for which purpose he opened a sea-cock in the ship's side to allow the water to flow in. The water, on its way from the sea-cock to the ballast tank, passed through a valve-chest, the joint between the lid and body of which had been packed in the ordinary way with cotton to make it watertight. This joint had been remade shortly before the plaintiff's goods were put on board, and it had been imperfectly done. When the tank was full the engineer screwed down the sea-cock, but, owing to the accidental presence of some hard substance, the screw-valve was prevented from bedding down closely on to its seating and the sea-cock was left partially open, with the result that the continued pressure of the water forced out the defective packing of the valve-chest, and the water flowed through the joint down into the lower part of the ship, where it passed through the sluice-door into the cargo hold and damaged the plaintiff's goods:—

Held, that the defective fitting of the sea-cock and of the sluice-door, being defects which came into existence after the plaintiff's goods were loaded, were not breaches of the implied warranty of the fitness of the ship to receive the cargo; but that the defective packing of the valve-chest, being an existing defect at the time of the loading of the goods, was a breach of the warranty.

TRIAL before Channell J. without a jury.

The action was brought to recover damages for injury to cotton delivered by the plaintiff to the defendants for carriage

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from Wilmington, U.S.A., to Bremen. The cotton was shipped on board the defendants' ship *Tolosa* under bills of lading which provided that the carrier should not be liable for loss or damage occasioned by "the perils of the seas or rivers," or by "accidents of navigation of whatsoever kind even when occasioned by the negligence, default, or error of judgment . . . . of the servants of the shipowner," and whereby it was also agreed that the shipment should be "subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress approved on the 13th day of February, 1893," commonly known as the Harter Act. The ship arrived at Wilmington in ballast on November 11, 1903, and she commenced to take the plaintiff's cotton on board on the following day, and the loading of the ship was not completed till the morning of November 24. Between November 17 and 21 all the ballast tanks except one, No. 4, were pumped out, and on the 23rd in the afternoon No. 4 ballast tank, which was not completely full of water, was "hardened up," that is to say, a sea-cock in the ship's side was opened to allow of the sea-water flowing into the tank and completely filling it. This operation of hardening up lasted about three hours, at the end of which time the sea-cock was screwed down. In its passage from the sea-cock to the tank the water had to pass through a valve-chest, about 2 feet long by 1 foot wide, containing several valves leading to the different tanks. The lid of this valve-chest was fastened down by bolts to a flange about $2\frac{1}{2}$ inches wide, there being inserted a layer of lamp-cotton and tallow between the lid and the flange for the purpose of making the joint tight. The screws of the valves projected through the lid of the valve-chest, so that the valves were capable of being screwed up or down without removing the lid. After the tank No. 4 had been sufficiently filled, the sea-cock was closed and screwed down hard, and the engineer on going his rounds on the night of the 23rd found everything apparently all right, with all valves and joints tight. On the morning of November 24 it was discovered that during the night a quantity of water had found its way into the stokehold, and thence into one of the cargo holds, owing to a sluice-door in the bulkhead between

the stokehold and the bilge beneath the cargo hold being imperfectly fastened down. The water was pumped out, and it was then discovered that the presence of the water in the stokehold was due, first, to some hard substance having got into the sea-cock and prevented the valve from bedding down firmly on to its seating, whereby the water continued to flow through the sea-cock after it had been screwed down; and, secondly, to the fact that the continued pressure of the water in the valve-chest had forced out the cotton packing, whereby the water escaped at the lid joint, and thence flowed down into the stokehold. The joint of the valve-chest had been remade shortly before the ship arrived at Wilmington, but it had been imperfectly made, and of insufficient strength to resist the pressure which it might reasonably be expected that it would be required to resist. The bulkhead between the stokehold and the bilge was intended to be a watertight bulkhead, and was so described in the shipbuilding plan. The sluice-door above mentioned had been opened on the morning of November 23 for the purpose of draining the bilges dry, and had been shut down after that operation was completed, but not sufficiently tightly to prevent the passage of water. In consequence of the water finding its way into the cargo-hold the bales of cotton belonging to the plaintiff, which were at the bottom of the hold, were damaged. The damaged bales had been loaded on board on November 12 or 13, some days before the accident happened.

Bailhache, for the plaintiff. There was a breach by the defendants of their implied warranty that the ship was seaworthy. That warranty of seaworthiness continues from the time when the vessel is tendered for the reception of the cargo down to the time of sailing. It is a warranty, in the first place, that she is fit to receive the cargo; secondly, it is a warranty that, in the interval between the loading and the sailing, she continues fit to act as a storehouse for the cargo; and, thirdly, that at the time of sailing she is fit to encounter the ordinary perils of the voyage. In the present case that warranty was broken in three particulars: the defective screwing

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down of the sea-cock, the defective packing of the joint of the valve-chest, and the insufficient closing of the sluice-door in the bulkhead, each and all caused the vessel to be unseaworthy as a storehouse for the cotton when loaded. If, however, the plaintiff is wrong in contending that the warranty of seaworthiness, in the sense of fitness for the cargo, continues after the goods are loaded, at all events the defect in the packing of the valve-chest was a breach of the warranty, for that defect was already in existence at the time when the goods were put on board. It is immaterial to consider whether that defect was due to negligence or not, for the warranty is an absolute warranty.

Lewis Noad, for the defendants. The warranty that the ship shall be fit to receive the cargo that she is intended to carry is not a continuing warranty. Just as in the case of the warranty of seaworthiness in the ordinary sense of that term—in the case, that is to say, of the warranty that the ship shall be fit to encounter the perils of the voyage—the warranty is at an end as soon as the ship has started and the voyage begun, so in the case of the warranty of fitness to receive the cargo the warranty is at an end as soon as the loading has begun, or, at all events, as soon as the cargo is on board. So far, then, as any question of breach of warranty is concerned, the bad fitting both of the sea-cock and of the sluice-door may be disregarded, for at the time those two defects came into existence the portion of the cargo that was damaged was already on board. Nor was the defective packing of the valve-chest a breach of warranty. A defect of that kind, which can be set right in a few minutes, does not amount to such a breach. Thus, in *Steel* v. *State Line Steamship Co.* (1), where the sea came through an insufficiently fastened porthole and damaged the cargo, Lord Blackburn suggested that if the porthole was in such a position that it could be shut at a moment's notice if the sea became rough, its being partially open would not amount to unseaworthiness; though it would be otherwise if the cargo were piled against the porthole so that considerable time would be required to get at the porthole, as was in fact subse-

(1) (1877) 3 App. Cas. 72.

quently held in *Dobell* v. *Steamship Rossmore Co.* (1) Here the valve-chest was in a position in which it could be easily got at, and if the packing had come out in the daytime the escape of the water would have been at once detected, and the defect would have been put right before any damage had been done. It was only because the packing came out in the night-time that any damage resulted; but that ought not to affect the question of seaworthiness. Moreover, under the terms of the bill of lading under which the cotton was carried, the warranty of fitness to receive it was not an absolute warranty, but only an undertaking to exercise care in that behalf. For the bill of lading incorporated the Harter Act, by s. 2 of which it is provided that it shall not be lawful for the owner of any ship carrying merchandise between ports of the United States and foreign ports to insert in any bill of lading any agreement "whereby the obligations of the owner . . . . of said vessel to exercise due diligence . . . . to make said vessel seaworthy . . . . shall in anywise be lessened." (2) The introduction of that clause necessarily imports that the parties intended that the shipowner's obligation should be limited to the exercise of due diligence. Here there was no evidence of want of diligence. The packing had successfully withstood the pressure during the whole of the time that the sea-cock was intended to be open. Then if there was no breach of warranty the defendants are relieved from liability by the exceptions of the bill of lading.

(1) [1895] 2 Q. B. 408.

(2) By the Act of Congress known as the Harter Act it is provided—

Sect. 2: "That it shall not be lawful for any vessel transporting merchandise or property from or between the ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage . . . . shall in anywise be lessened, weakened, or avoided."

Sect. 3: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

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The presence of the hard substance in the sea-cock, and the consequent incursion of the sea-water through it, was an ordinary "peril of the sea." Further, the defects in the packing of the valve-chest and in the closing of the sluice-door were "accidents of navigation." In *The Southgate* (1), where the defendants' engineer improperly left open a circulating-pump delivery-valve in the side of the ship whereby a quantity of sea-water entered the ship and damaged the cargo whilst the ship was lying at her moorings engaged in loading, Gorell Barnes J. expressed a strong opinion, though he declined to decide the point, that the damage was an accident of navigation. So, too, in *The Carron Park* (2), where the cargo was damaged whilst the ship was still loading by water which came through a valve negligently left open by the shipowners' servants, it was held that the damage came within an exception by which the shipowners were not to be responsible for any neglect or default of their servants "during the voyage." So in *The Glenochil* (3) it was held that the exception in the Harter Act of "faults or errors in the management of the vessel" was not limited to the period during which the vessel was at sea.

Bailhache, in reply. The extent of the obligation which the shipowner undertakes, under the implied warranty of fitness to receive the cargo, is not cut down by the incorporation of the provisions of the Harter Act in the bill of lading. It has been held in America that neither the provisions of s. 2 of that Act, which prohibit the shipowner from inserting in his bills of lading a clause exempting him from the obligation to use due diligence to make the vessel seaworthy, nor those of s. 3, which exempt him from loss resulting from faults or errors in navigation or in the management of the ship if he has exercised due diligence to make her seaworthy, raise any implication that the law has relieved him from the duty of furnishing a seaworthy ship: *The Carib Prince*. (4) But if the Court is disinclined to follow that decision, and if the incorporation of the Harter Act is to be treated as limiting the defendants' duty to the exercise of due diligence, here due diligence was not in fact exercised. The

(1) [1893] P. 329.
(2) (1890) 15 P. D. 203.
(3) [1896] P. 10.
(4) (1898) 170 U. S. 655.

fact that the packing of the valve-chest was forced out, without any extraordinary pressure and after the joint had been made but a short time, points to the conclusion that it must have been carelessly made at the outset. And to satisfy the provisions of that Act it is necessary to shew, not merely that the shipowner has personally exercised due diligence, but that his servants have done so also: *Dobell* v. *Steamship Rossmore Co.* (1) There was also negligence in not fitting down the sluice-door properly. Under these circumstances it becomes unnecessary to consider whether the facts of the case come within any of the exceptions of the bill of lading.

CHANNELL J. I have to consider whether upon the facts of this case the shipowners are responsible for the damage to the plaintiff's cotton. Mr. Bailhache rests his case upon a breach of the implied warranty of seaworthiness, or rather of the implied warranty that the vessel is fit for the reception of the goods and for carrying them upon the voyage in question. Now I think it is clear that, apart from the Harter Act, that warranty is an absolute warranty; that is to say, if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the shipowner does not know of, and it is no excuse for the existence of such a defect that he used his best endeavours to make the ship as good as it could be made. And there is also another matter which seems to me to be equally clear—that the warranty of seaworthiness in the ordinary sense of that term, the warranty, that is, that the ship is fit to encounter the ordinary perils of the voyage, is a warranty only as to the condition of the vessel at a particular time, namely, the time of sailing; it is not a continuing warranty, in the sense of a warranty that she shall continue fit during the voyage. If anything happens whereby the goods are damaged during the voyage, the shipowner is liable because he is an insurer except in the event of the damage happening from some cause in respect of which he is protected by the exceptions in his bill of lading. His liability for anything happening after the ship has sailed depends, not

(1) [1895] 2 Q. B. 408.

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upon there being a breach of a warranty that the ship shall continue fit, but upon his position as carrier. So, too, it is clear that the warranty of the ship being fit to encounter the perils of the voyage does not attach before she sails and while she is still loading her cargo. There is, of course, no warranty at the time the goods are put on board that the ship is then ready to start on her voyage; for while she is still loading there may be many things requiring to be done before she is ready to sail. The ordinary warranty of seaworthiness, then, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed: it takes effect at the time of sailing, and at the time of sailing alone. But Mr. Bailhache contends that the warranty with which we are here concerned, namely, that the ship was fit to receive the goods, differs in this respect from the warranty of fitness to encounter the perils of the voyage: he says that it is a continuing warranty, meaning thereby a warranty that the ship shall continue fit throughout the period of loading. Now there is very little authority about the warranty of fitness to receive the cargo; but when one comes to consider it as a matter of principle, I do not think there is much difficulty about it. In my opinion one must apply the rule which one would have to apply to the warranty of seaworthiness when the voyage is in stages. When a voyage is in stages the warranty is that the ship on starting on each particular stage is fit for that stage. Thus, if she is going to stop at an intermediate port, she must have sufficient coals to take her to that port, but she is not bound to have sufficient coals to take her the whole voyage. It is treated as a separate warranty for each stage of the voyage. I think one must apply exactly the same rule to the loading stage of a vessel whilst she remains in her port of loading. I think the warranty is that at the time the goods are put on board she is fit to receive them and to encounter the ordinary perils that are likely to arise during the loading stage; but that there is no continuing warranty after the goods are once on board that the ship shall continue fit to hold the goods during that stage and until she is ready to go to sea, notwithstanding any accident that may

happen to her in the meantime. And the reason for so holding is precisely the same as that which exists with respect to the warranty of fitness to encounter the perils of the voyage; as soon as the goods are on board they are in the custody of the carrier, and he is liable for any accident which then happens because he is an insurer of them unless he is protected by some clause in his bill of lading. In that view of the matter, then, I proceed to consider whether the facts of the present case shew a breach of the warranty of fitness to receive the cargo. If there was such a breach, I think it is clear that the exceptions in the bill of lading would not apply to exempt the defendants from liability; for primâ facie words of exception are intended to exempt the shipowner only from his liability as a carrier, and not to affect the warranty that would otherwise be implied. An intention to exclude the warranty must be indicated by express words, and there are no such express words here. Now it is suggested by the plaintiff that there was a breach of the warranty in respect of each of the three apertures through which the water came. The sluice-door in the bulkhead was left insufficiently screwed down, and if it had been left in that condition before the goods were loaded I think that that fact would have amounted to a breach of the warranty; for it was an aperture which in the ordinary state of things ought to have been closed except when it was being used, and it was imperfectly closed. It was not obviously left open, and was consequently a source of danger. Thus it is a breach of warranty of seaworthiness to go to sea with a porthole which is improperly closed but is believed to be closed, and which is in such a position that the defect cannot be remedied immediately and in time to prevent the damage being done: *Dobell* v. *Steamship Rossmore Co.* (1) But here the opening and imperfect closing of the sluice-door only took place the day before the damage happened, and long after the goods were on board. Therefore, in my opinion, it cannot amount to a breach of the warranty as I have interpreted it. The same observations apply to the insufficiently closed sea-cock. It was intended to be closed and was apparently closed,

(1) [1895] 2 Q. B. 408.

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and was consequently in a dangerous condition. But that state of things also was brought about after the goods were on board, and consequently was not a breach of the warranty. Then we come to the defective packing of the valve-chest. It may be that that is a defect which points to a certain amount of negligence on the part of the man who packed the joint, but it is immaterial for the present purpose to consider whether there was negligence or not, for, as I have already said, the warranty is, apart from any consideration of the Harter Act, an absolute warranty. The result shews that in fact there was a defect, in the sense that the packing was not as good as it ought to have been. It resisted the pressure during the three hours that the tank was being hardened up, but was insufficient to resist the subsequent pressure. That defect, unlike those in the sluice-door and the sea-cock, existed before the plaintiff's goods were loaded. Whether a particular defect is sufficiently substantial to amount to a breach of the warranty must in all cases be a question of fact; but it is a question of fact which must be determined by certain rules. And the rule applicable to the present case is, I think, correctly stated in a passage in Carver on Carriage by Sea, s. 18, where it is said that a vessel "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen, undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, Would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking." Applying that to this case, I cannot doubt that any prudent owner, if he had known that the joint would not resist something more than a three hours' pressure, would have at once ordered the joint to be remade. Therefore, it seems to me that I must hold that the defect was a substantial one, and that as it existed before and at the time of the loading of the goods it amounted to a breach of the warranty, unless the incorporation of the Harter Act in the bill

of lading makes any difference. Then does the incorporation of that Act make any difference? For the purposes of this question I will assume that there was no negligence in the packing of the valve-chest, though I do not decide that point one way or the other. Is the absence of negligence material? In other words, does the incorporation of the Harter Act have the effect of cutting down the absolute warranty of fitness to an undertaking to exercise due diligence to make the ship fit? In my opinion it does not. The effect of the incorporation of s. 2, which provides that it shall not be lawful to insert a clause in a bill of lading whereby the obligation of the owner to exercise due diligence to make the vessel seaworthy shall be lessened, is as though the parties said, "If we have in the exceptions inadvertently inserted a clause cutting down the obligation in respect of seaworthiness below an obligation to exercise care, that clause shall be null and void"; but it does not amount to a stipulation that the exercise of due diligence shall be sufficient. For that purpose an express stipulation is necessary, and there is none to be found in the section itself, and of course therefore none imported by its incorporation. And the incorporation of s. 3 does nothing more than give immunity in respect of loss resulting from certain specified causes in the course of the voyage, provided the shipowner has exercised due diligence to make the ship seaworthy. The reference to due diligence is a mere qualification upon that immunity; it is not a limitation of the obligation under the warranty. There has, therefore, been a breach of the warranty of the fitness of the ship to receive the cargo, and the defendants are consequently responsible.

Under these circumstances, it becomes unnecessary to consider whether these several contributory causes of the damage to the plaintiff's cotton were within the excepted perils of the bill of lading, though, if I had come to the conclusion that the defect in the valve-chest was not a breach of the warranty, I should have inclined to the view that they were. I think the defendants would have been exempted both by the provisions of s. 3 of the Harter Act and also by the other exceptions specified in the bill of lading. I think the authorities shew

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that the words "in the management of the vessel" in s. 3 include matters that are complained of during the period of the loading.

Judgment for the plaintiff.

Solicitors for plaintiff: *Thomas Cooper & Co.*
Solicitors for defendants: *W. H. Crump & Son.*

J. F. C.

1905
Jan. 18.

MYLAM *v.* MARKET HARBOROUGH ADVERTISER COMPANY, LIMITED.

Revenue—Income Tax—Company—Exemption—Income not exceeding 160*l.*—*Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 163—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 34.

A limited company registered under the Companies Acts is not exempt from liability to the payment of income tax by reason merely of its income not exceeding 160*l.* a year.

CASE stated by Commissioners of Income Tax.

The Market Harborough Advertiser Company, Limited, appealed against the following assessments under Scheds. A and D of the Income Tax Acts, namely: an assessment made on the company under Sched. D for the year ending April 5, 1904 (based on the average profits of the company for the three years preceding the year of assessment), of 83*l.*, being 133*l.* less 50*l.* for depreciation; and also an assessment made under Sched. A, for the same year, on a tenant of the company, as occupier of a house and shop owned by the company, of 37*l.* 18*s.*, being 45*l.* 8*s.*, the rent of the house and shop, less 7*l.* 10*s.* for repairs. It was admitted by the company that the assessments were correct in amount, and the only question in dispute was whether or not the company was entitled to exemption from income tax by reason of its total income not exceeding 160*l.*

The Market Harborough Advertiser Company, Limited, was a limited company registered in 1892 under the Companies Acts, 1862 to 1890, having its registered office in Church

Street, Market Harborough, which carried on the business of a newspaper proprietor, distributing the profits, or such part of the profits as might be determined at the general meeting, in dividends to its shareholders, of whom some were personally liable to income tax and some had incomes within the statutory limit of exemption. The capital of the company was 2000*l.* in 2000 shares of 1*l.* each, the whole of which had been subscribed and were fully paid up. By clause 1 of the articles of association the regulations in Table A in the 1st schedule to the Companies Act, 1862, were to apply to the company except as thereinafter provided. Clause 4 of the articles of association was as follows: "The directors may from time to time set aside such portions of the money and revenue of the company as they shall think fit as a reserve and depreciation fund. Such fund shall be applicable at the discretion of the directors towards meeting bad debts, providing for extraordinary expenses or for equalization of dividends, and for other purposes of the company to which its money or revenue may be properly applicable." The following (among other) regulations in Table A applied to the company: (72.) "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." (73.) "No dividend shall be payable except out of the profits arising from the business of the company."

The company's profits for each of the three years preceding the year of assessment were dealt with by the shareholders in general meeting on the recommendation of the directors, as follows: (1.) By writing off 50*l.* for depreciation on machinery, type, and plant; (2.) by placing a sum to the reserve fund; (3.) by paying a dividend to shareholders; (4.) by paying a sum to the directors for their services during the year; and (5.) by carrying forward a balance to the next account. The amount of the gross profits of the company for the year ending March 31, 1903, was 280*l.* 17*s.* 2½*d.*, which, being added to the balance in hand of 8*l.* 14*s.* 2½*d.*, made a total of 289*l.* 11*s.* 5*d.* From this amount 50*l.* was deducted for depreciation in machinery, type, and plant, 25*l.* was placed to the reserve fund, 100*l.* was expended in paying a dividend to the shareholders at the rate

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of 5 per cent., 15*l.* was paid to the directors for their services during the year, and a balance of 99*l.* 11*s.* 5*d.* was carried forward to the next account. It was admitted on behalf of the company that it was proposed to deal with their profits for the year ending March 31, 1904, as in former years, by writing off a sum for depreciation, placing a sum to the reserve fund, paying a dividend to the shareholders, making a payment to the directors for their services, and carrying forward a balance to the next account.

On behalf of the company it was contended (*a*) that on the proper construction of the interpretation clause (s. 192) of the Income Tax Act, 1842, the company, being a "body politic or corporate," was by the operation of such clause deemed to be a "person," and consequently was entitled to the exemption conferred by s. 163 of that Act, it being immaterial to the point whether the company paid dividends or not, as those shareholders who were individually liable to the tax would have to include any dividends received by them free of tax in their own returns; (*b*) that taxing Acts, being in the nature of penal ones, must be construed very strictly, and that persons coming within the words of the exemption clauses were entitled to take advantage thereof, whether the result was contemplated at the time the Act came into operation or not.

The surveyor of taxes pointed out that s. 192 of the Act of 1842, in interpreting the word "person" to include a "body politic or corporate," limited that extended construction by the words "unless it be otherwise specially provided or there be something in the subject or context repugnant to such construction," and contended (*a*) that s. 100 of the Act of 1842, rule 3 of the rules applicable to Cases 1 and 2, specially provided for the allowance of exemption, not to a body of persons carrying on a concern and earning profits in common, but separately to the individual members of such body, and (*b*) that to regard a dividend-paying joint stock company, whose shareholders might or might not be personally exempt from income tax, as a person entitled to exemption in respect of its corporate profits, was repugnant to the sense and spirit of the exempting sections of the Acts. He also contended (2.) that, as the

company was registered under the Companies' Acts, 1862 to 1890, it could not be within the meaning of the expression "body politic or corporate" in s. 192 of the Income Tax Act, 1842, at the date of which the only incorporated bodies were those under either Royal Charter or special Act of Parliament; (3.) that even if the company was a person within s. 192, then s. 163 excepted from exemption so much of the tax as the company should or might be entitled to deduct or retain from or out of any payment to which the company might be or become liable, and as the company applied or might apply its profits in payment of dividends or other sums from which the company was entitled to deduct income tax, the company was not entitled to exemption.

The Commissioners decided in favour of the company, and the surveyor of taxes appealed. The question of law for the opinion of the Court was whether the Commissioners were right or not, either in whole or in part, in deciding that the company was entitled to exemption from income tax.

Sir E. H. Carson, S.-G. (*Rowlatt* with him), for the appellant. The decision of the Commissioners was wrong, and the respondents are not exempt from liability to assessment to income tax merely on the ground that their income does not exceed 160*l*. First, a body corporate is not a "person" within the meaning of s. 163 of the Income Tax Act, 1842. (1) Secondly, the case falls within the exception from exemption contained

(1) By s. 163 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), "Any person charged or chargeable to the duties granted by this Act, either by assessment, or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled, who shall prove before the Commissioners for general purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than 150*l*., shall be exempted from the said duties, and shall be entitled to be repaid the amount of all deductions or payments on account thereof in the manner hereinafter directed, except so much of such duties as the person claiming such exemption shall or may be entitled to charge against any other person, or to deduct or retain from or out of any payment to which claimant may be or become liable. . . . ."

By s. 34 of the Finance Act, 1894 (57 & 58 Vict. c. 30), the limit of total exemption is raised so as to include incomes not exceeding 160*l*. a year.

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in that section, inasmuch as the income tax is really paid upon the dividends of the shareholders and not upon the income of the corporate body, and a shareholder entitled to exemption can obtain repayment of income tax in the usual way upon making application to the authorities. The machinery for the assessment of income tax in the case of corporate bodies is contained in s. 54 of the Income Tax Act, 1842, and clearly shews that the tax is not, strictly speaking, paid by a company itself, but that it is collected by the company from the individual shareholders by deducting it from the dividends payable to them before the dividends are actually paid; the section does not impose any fresh tax upon the company as distinct from its shareholders. Some assistance may be derived from a consideration of the provisions of s. 100, rule 3, of the Act of 1842 as to the case of partners; the assessment is made upon them jointly, and by s. 168 a partner may claim exemption or abatement, in which case his share will be separately assessed; no provision, however, is made as to a claim for exemption or abatement by the partnership firm. A shareholder in a company is in an analogous position for this purpose to that of a partner in a firm. The case of *Inland Revenue* v. *Old Monkland Conservative Association* (1), which was cited to the Commissioners, is at first sight apparently in favour of the respondent; but when examined the facts are wholly different, and the decision is not an authority in the present case. The body sought to be made liable was an unincorporated body, and the assessment was made under Sched. A upon a house owned and occupied by the association, and not upon profits under Sched. D; in the present case the assessment under Sched. A in respect of the house is made upon the tenant of the respondents, who pays rent to them, which rent when paid is apparently treated as part of the company's gross profits.

The respondents did not appear.

PHILLIMORE J. The question which I have to decide is whether the Commissioners were right in exempting this small limited company, a trading company, from liability to payment

(1) (1904) 42 Sc. L. R. 121.

of income tax in respect of its revenue, arising partly from land and partly from the profits of its business, on the sole ground that its total income was not more than 160*l*. The Commissioners went fully and fairly into the question before allowing the exemption, but I am of opinion that their decision was wrong and that this appeal should be allowed. I do not base my decision on the ground that the word "person," as used in s. 163 of the Income Tax Act, 1842, necessarily excludes a corporation, nor do I desire to express any opinion on that point. Assuming for the present purpose that a corporation is a person within the meaning of the Act, the exemption in s. 163 is carefully conditioned, and not absolute; there is excepted from its operation "so much of such duties as the person claiming such exemption shall or may be entitled to charge against any other person, or to deduct or retain from or out of any payment to which such claimant may be or become liable." Under s. 54 an incorporated body must make a return of an estimate of its profits and gains, together with a declaration of the manner in which the profits are estimated; the estimate must be made before payment of any dividend, and when the dividend is paid the shareholders are to allow out of their dividends a proportionate reduction in respect of the duty charged. In the present case the company was bound to make the statutory return of its profits before payment of any dividend, and in paying the dividends they were entitled to deduct from the dividend of each shareholder the proper quota or proportion of income tax chargeable to him. I think, therefore, that there is no ground for holding that this company is entitled to exemption, and that the case falls within the exception in s. 163. The company loses nothing by this decision or by paying the income tax, because it deducts the amount of the income tax from the dividends before paying them to the shareholders; and equally the shareholders lose nothing, because, if any shareholder is entitled to exemption, there is a well-known procedure by which he can obtain repayment of the amount of income tax deducted.

At one time I thought that the present case might be complicated by reason of a portion of the property of this company

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having been assessed under Sched. A in respect of a house which was let to a tenant upon whom the assessment was in fact made, and my attention was called to the case of *Inland Revenue* v. *Old Monkland Conservative Association* (1), which it was suggested before the Commissioners really governed the present case. But on examination that case appears to me for several reasons not to be in point. In that case there was an unincorporated body, a mere collection of persons, each one of whom was assumed to be individually entitled to exemption; and, further, the house was not let to a tenant, but was occupied by the unincorporated body who had been assessed under Sched. A. That case is an exceptional one, and very different in its facts from the one which I am considering. There must be judgment for the Crown.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

(1) 42 Sc. L. R. 121.

W. J. B.

[IN THE COURT OF APPEAL.]

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Feb. 24, 25.

SEYMOUR *v.* PICKETT.

Dentist—Unregistered Dentist—Right to sue for Fees—Cheque given by Patient—Subsequent Dishonour—Action on Cheque—Debtor and Creditor—Appropriation of Payments—Right of Creditor to appropriate—Time when Appropriation must be made—Appropriation to Cost of Material—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *ss.* 3, 5.

A person who is not registered under the Dentists Act, 1878, though he is prohibited by s. 5 of the Act from recovering any fee for the performance of any dental operation, can maintain an action for the price of material, such as gold and false teeth, supplied by him to a patient.

Hennan & Co. v. *Duckworth*, (1904) 20 Times L. R. 436, followed.

When a payment made by a debtor to his creditor has not been appropriated by the former, the creditor is entitled to elect how he will appropriate the payment "up to the very last moment" (as was said by Lord Macnaghten in *The Mecca*, [1897] A. C. at p. 294), and he may make an appropriation even when he is being examined as a witness in an action by him against the debtor.

A person who was not registered under the Dentists Act, 1878, operated as a dentist on a patient, and supplied him with false teeth and gold. He made a charge of 45*l.*, and the patient gave him two cheques for 20*l.* and 25*l.* respectively, the latter cheque being post-dated. The 20*l.* cheque was duly paid, but the 25*l.* cheque was dishonoured on presentation, the drawer having stopped the payment of it by his bankers.

The dentist brought an action in the county court against the patient on the 25*l.* cheque. The judge found that 21*l.* represented the price of the gold and other material supplied by the plaintiff. The plaintiff when being examined as a witness claimed to appropriate the 20*l.* cheque to the payment of his professional fees. No appropriation had been made by the patient:—

Held, that the plaintiff was entitled to make the appropriation, and to recover the 21*l.* in the action.

Decision of the King's Bench Division (Lord Alverstone C.J. and Kennedy and Ridley JJ.) reversed.

On the appeal the plaintiff's counsel abandoned his claim to the extra 4*l.*, and the Court declined to express any opinion whether the plaintiff could have recovered that sum.

APPEAL from a decision of a Divisional Court (Lord Alverstone C.J. and Kennedy and Ridley JJ.) reversing a decision of the judge of the Westminster County Court.

The plaintiff practised as a dentist, though he was not

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registered under the Dentists Act, 1878. In June, 1903, the defendant consulted the plaintiff about his teeth, and the plaintiff advised that certain work should be done, which included the making of a bridge and stopping some teeth, for which the plaintiff said that his charge would be 45*l.* This the defendant agreed to pay, and the work was accordingly done by the plaintiff. When the work was completed on July 20, 1903, the defendant gave the plaintiff two cheques, one for 20*l.*, dated that day, and the other for 25*l.*, which was post-dated August 8, 1903. The plaintiff then gave a receipt as follows: "Dr. L. N. Seymour presents his compliments to W. R. Pickett, Esq., and begs to say his fee for professional services rendered to self to date is—45*l.* Received with thanks. (Signed) L. N. Seymour." The cheque for 20*l.* was duly paid on presentation. Before August 8 arrived the defendant, being dissatisfied with the plaintiff's work, instructed his bankers not to pay the 25*l.* cheque, and when it was presented it was dishonoured. Notice of dishonour was given to the defendant.

The plaintiff on September 10, 1903, issued in the King's Bench Division the writ in the action, by which he claimed against the defendant as drawer of the cheque for 25*l.*, of the dishonour of which on presentation the defendant had notice. The plaintiff claimed 25*l.* and 2*s.* 3*d.* for interest, and also interest until payment or judgment, and costs.

The plaintiff applied for judgment under Order XIV., and on October 8, 1903, an order was made that, if the defendant paid into court within ten days the sum of 25*l.* 2*s.* 3*d.*, he should be at liberty to defend the action, and the action should be remitted to the Westminster County Court. On October 16, 1903, the money was accordingly paid into court.

On November 6, 1903, the defendant gave notice that he intended at the trial of the action to rely on the statutory defence—s. 5 of the Dentists Act, 1878.

The action was tried in the county court on February 26, 1904, when judgment was given for the plaintiff. The learned judge found that the plaintiff had not held himself out as being a registered dentist.

The defendant appealed to the Divisional Court. The appeal

was heard on May 18, 1904, when the appeal was allowed, and a new trial was ordered on the question whether any part of the 25*l.* represented material (such as gold) supplied by the plaintiff, apart from his professional services.

The action was tried again in the county court on June 9, 1904. When the plaintiff was being examined as a witness he claimed to allocate to the 25*l.* cheque the gold and other material which he had supplied, and the mechanical work which he had done in connection with the materials.

The learned judge delivered judgment on July 1, 1904. He held that the cheques were treated by both parties as payment, and that, there being nothing illegal under the Act in the giving of dental advice or the performance of dental operations by an unregistered person, there was good consideration for the cheque for 25*l.*, and the plaintiff was entitled to recover upon it. But, if the cheque was not payment, and the plaintiff was only entitled to recover the price of materials supplied and work done in making up the materials, the learned judge assessed that claim at 21*l.* He said that the plaintiff claimed the right to appropriate up to verdict. The only evidence of appropriation was the receipt given by the plaintiff, and the learned judge was of opinion that by the terms of that receipt the plaintiff was entitled to rely on it as an appropriation of the 20*l.* to his services as a dentist, made not only by himself, but by the defendant also at the time of making the payment. In that view he would give judgment for the plaintiff for 21*l.*, with costs. If, however, the plaintiff could not so appropriate the 20*l.*, it followed that there would be only 1*l.* due to him, and for that there would be judgment with no order as to costs.

The defendant again appealed to the Divisional Court, and the appeal was heard on November 2, 1904, when the Court held that the plaintiff was only entitled to recover 1*l.*, without costs, and that the defendant should have the costs of the appeal.

In giving judgment Lord Alverstone C.J. said that he could see no evidence that the cheque was taken by the plaintiff in payment, or, to put it more correctly, in accord and satisfaction, so as to discharge the original debt.

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On the second point, the learned Chief Justice said that the county court judge had found that the only evidence of appropriation of the 20*l.* cheque was the receipt which the plaintiff had given, and that receipt was, in his Lordship's opinion, no evidence of appropriation. He was inclined to think that an appropriation so as to alter the rights of the parties could not be made by a statement in the witness-box, and that there must be an indication of appropriation before the case came on for trial. But in the present case the judge had not acted on any oral evidence. He said the receipt was the only evidence, and his Lordship held that it was not evidence of appropriation by either party. The result was that the plaintiff could only recover 1*l.* The other learned judges concurred.

The plaintiff appealed from the second judgment of the Divisional Court, and, by special leave of the Court of Appeal, appealed also from the first judgment.

Harold Morris, for the plaintiff. The cheque for 25*l.* was given by the defendant, and was accepted by the plaintiff in payment of what was due to him. The Act of 1878 only makes it illegal for an unregistered person to represent himself as a registered dentist, and prevents him from recovering his fees. (1) But there is nothing illegal in a contract to pay him, and therefore there was good consideration for the cheque for 25*l.*, and the action can be maintained.

[This point was ultimately abandoned, and the Court gave

(1) By the Dentists Act, 1878, s. 3, "From and after August 1, 1879, a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act," and a penalty is imposed for the breach of this provision. By s. 5, "A person registered under this Act shall be entitled to practise dentistry and dental surgery in any part of Her Majesty's dominions, and from and after August 1, 1879, a person shall not be entitled to recover any fee or charge, in any Court, for the performance of any dental operation or for any dental attendance or advice, unless he is registered under this Act, or is a legally qualified medical practitioner."

no decision upon it. It is therefore considered unnecessary to report fully the argument on that point, or to mention the cases which were cited.]

Notwithstanding the provisions of the Act an unregistered person is entitled to recover the cost price of material, such as false teeth, supplied by him and mechanical work done by him, other than professional work: *Hennan & Co.* v. *Duckworth.* (1)

That being so, it is contended that, no appropriation of the cheques having been made by the defendant at the time when they were given, the plaintiff had a right to appropriate them at any time up to the decision of the county court judge on the second trial, and that he made an effectual appropriation when he was in the witness-box on that trial: *The Mecca.* (2) In that case Lord Macnaghten said: "It has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money."

And the appropriation may be made to the payment of a debt which cannot be recovered by law: *Philpott* v. *Jones.* (3)

It is submitted, therefore, that the plaintiff is entitled to judgment for 21*l.*

G. A. Scott, for the defendant. It is submitted that the plaintiff could not make the appropriation when the matter was in contest before the Court. He could not thus alter the rights of the parties. In the absence of appropriation, the law would appropriate the 20*l.* cheque to the payment of that debt which was recoverable by action: *Wright* v. *Laing.* (4)

[ROMER L.J. referred to *Mills* v. *Fowkes.* (5)]

(1) 20 Times L. R. 436.

(2) [1897] A. C. 286, at p. 294.

(3) (1834) 2 A. & E. 41; 41 R. R. 371.

(4) (1824) 3 B. & C. 165; 27 R. R. 313.

(5) (1839) 7 Scott, 444; 50 R. R. 750.

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When Lord Macnaghten said that there is a right of election "up to the very last moment," he must have meant up to the time of the issue of the writ. The plaintiff ought to have issued a writ for goods sold and delivered. There ought to be some definite act of appropriation, like the issue of a writ. The action was brought on the cheque, and when the writ was issued the plaintiff had no notion he could not sue upon it. And the receipt which he gave was for "professional services." The finding of the county court judge, that there was no evidence of appropriation except the receipt, is conclusive.

[VAUGHAN WILLIAMS L.J. That was a finding of law, not of fact.]

In *Philpott* v. *Jones* (1) Taunton J. said that the plaintiff might make the appropriation "at any time before the case came under the consideration of a jury." That is, the right of appropriation cannot be exercised after the trial has begun.

[VAUGHAN WILLIAMS L.J. In *Peters* v. *Anderson* (2) it was held that an election to appropriate "may be inferred from the circumstances of the transaction."]

The law on this point was summarized by Stirling J. in *Friend* v. *Young*. (3)

Harold Morris, in reply.

Cur. adv. vult.

VAUGHAN WILLIAMS L.J. The plaintiff, who was an unregistered dentist, and therefore subject to the operation of s. 5 of the Dentists Act, 1878, brought this action in the High Court. The action was remitted to the county court, and the defence, of which notice was given, was based upon s. 5 of the Act. Judgment was originally given in the county court for the plaintiff for 25*l*., the whole amount of the dishonoured cheque. The defendant appealed to the Divisional Court, and that Court were of opinion that the defence thus set up was a good defence so far as the consideration for the cheque was any dental operation or dental attendance or advice. But it was

(1) 2 A. & E. 41, at p. 44; 44 R. R. 371.

(2) (1814) 5 Taunt. 596; 15 R. R. 592.

(3) [1897] 2 Ch. 421.

plain from the case opened by both sides that in part the consideration for which the cheque was given was not any dental operation or dental attendance or dental advice, but the making and supplying a dental bridge, and under these circumstances the Divisional Court, although allowing the appeal from the county court judge, remitted the case to him expressly in order that he might determine what, if any, part of the consideration for the cheque was goods supplied and work done outside the words of s. 5 which disentitle an unregistered dentist to sue for fees. It is quite plain that the Divisional Court on that occasion took the same view which we take. The Divisional Court did not treat the contract or the consideration of the contract as being illegal or given in respect of an illegal purpose, for if they had come to either of those conclusions, or if they had come to the conclusion that the debt which is alleged to have arisen here, and which by reason of s. 5 cannot be enforced by action, was a prohibited debt in respect of a prohibited contract, they would not have remitted the case to the county court judge, but would have disposed of the whole matter at once. In my opinion, it is plain that s. 5 merely prevents the recovery by action of the fees and charges and does nothing more. When the case came to be disposed of by the learned county court judge at the second hearing, he found, amongst other things, that to the extent of 21*l.* the cheque was given for goods supplied. That left 4*l.*, the balance of the cheque, which would be applicable to the fees and charges for which by s. 5 an unregistered dentist is not entitled to sue. If we had to decide the question of the right to recover that 4*l.*, a somewhat difficult point would arise which is not absolutely concluded one way or the other by authority. We have not, however, now to decide whether a cheque given for such fees and charges was given for such consideration as would entitle an unregistered dentist to sue upon it. Upon that point I desire not to be taken as expressing any final opinion. It is unnecessary to decide that point, because the plaintiff's counsel withdrew his claim altogether with respect to the 4*l.*

I therefore propose to deal simply with the 21*l.* When once

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we arrive at the conclusion that this is not a case of illegal contract or illegal consideration, the cases which decide that when a cheque is given or a contract to pay is made in respect of a consideration which is in part illegal or unlawful no part of the contract can be enforced, have no application. With respect to the 21*l.*, which the county court judge found represented the price of matters not falling within s. 5, the only point which we have now to decide is whether the plaintiff had a right to appropriate the 25*l.* cheque which he exercised at a time when he was entitled so to do. It does not appear that this question was much discussed upon the appeal to the Divisional Court. A good many authorities have been cited upon the present appeal upon the question under what circumstances and for how long a creditor, who has received from his debtor a sum of money unappropriated to any particular debt, has a right to appropriate that sum. In some of the cases—I refer in particular to *Philpott* v. *Jones* (1) and *Peters* v. *Anderson* (2)—the matter was stated in ways which vary a little in the different judgments. Sometimes it was said that the right of the creditor to appropriate lasted until the writ was issued. Sometimes it was said that it lasted until the matter came before the jury. But it is not necessary to discuss those cases at length, because the question was really settled by the observations of Lord Macnaghten in *The Mecca* (3), to which I will refer presently.

But I wish before doing so to say this. At one time it seems to have been supposed that the creditor must exercise this right at the time when he receives the money. In *Simson* v. *Ingham* (4) Best J. seems to have thought that the creditor might exercise his right within "a reasonable time." But the authorities which have been cited, and especially the two which I have just mentioned, put an end to both these notions. Throughout all the authorities it is plain that the right which the creditor has is in the nature of an election, and the question to be ascertained in each case is whether anything has happened to determine that right to elect. Of course, the

(1) 2 A. & E. 41.
(2) 5 Taunt. 596.
(3) [1897] A. C. 286, 293.
(4) (1823) 2 B. & C. 65, 75; 26 R. R. 273.

receiver of the money may make his election before there is any litigation, or the litigation may be of such a nature that the election may be made by the issue of the writ in the case of a plaintiff or by the delivery of the defence in the case of a defendant. But, on the other hand, there may be legal proceedings in which in no sense could the writ or the defence operate as an election, because there is nothing in the action which involves any election. Take the present action—obviously the mere bringing of the action to recover the 25*l.* did not involve any election. Nor did the fact that the plaintiff joined issue upon the defendant's notice of defence involve in the present case any election with regard to the appropriation of this money. The first time at which any such question was raised was when the action was remitted to the county court judge, and it is beyond dispute that the plaintiff did, when he was in the witness-box in the county court, make his election. In my opinion he was entitled to do so then, if nothing had previously happened to determine his right of election. I think that up to that time the plaintiff had done nothing which determined his right of election to appropriate the cheque, or which amounted to an appropriation by him before the second trial of the action. The defendant's counsel fixed the date of the issue of the writ as the time of appropriation, and said that from that moment, not only was the plaintiff's right to appropriate determined, but also the appropriation was effected by law. But, though very often an appropriation is effected by law, whether by the application of the rule in *Clayton's Case* (1) or otherwise, yet I know of no rule of law which would apply to this particular case. Under these circumstances we have to consider whether there is anything in the rule laid down by Lord Macnaghten in *The Mecca* (2) which had determined the plaintiff's right of election. The noble Lord there said: "Now, my Lords, there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he

(1) (1816) 1 Mer. 572; 15 R. R. 161. (2) [1897] A. C. 286, 293.

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makes the payment, the right of application [*sic*] devolves on the creditor. When *Clayton's Case* (1) was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the civil law, or, at any rate, within a reasonable time, whatever that expression in such a connection may be taken to mean. But it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment.'" Applying that rule to this case, in my opinion there was nothing done, down to the moment when the plaintiff made his statement in the witness-box, to determine his right of election, and under these circumstances he had, in my judgment, a right then to make the appropriation. That being so, there is an end of the defendant's case. I agree with the Divisional Court that, as between the original parties to the cheque, the plaintiff can recover so much as was attributable to matters outside the Act. In my opinion the plaintiff exercised his right of appropriation effectively and at a time when he was entitled to do so. Judgment must therefore be entered for the plaintiff for 21*l.*

ROMER L.J. I have arrived at the same conclusion. The Divisional Court on the first appeal decided that the plaintiff was not entitled to recover upon the cheque for 25*l.*, so far as it was given for work done which comes within the provisions of s. 5 of the Dentists Act, 1878. That I will call the main point decided in the action. But the Court pointed out, and I think rightly, that, so far as the cheque represented the price of work done or materials supplied outside s. 5, the plaintiff ought to recover, and accordingly they remitted the action to the county court judge in order that he might determine what part of the 25*l.* represented work done and materials supplied outside that section. The county court judge found that on that footing the plaintiff was entitled to recover 21*l.* The circumstances gave rise to a further question, which was then, I think, for the first time raised, namely, whether the prior payment of 20*l.* made by the defendant ought or

(1) 1 Mer. 572; 15 R. R. 161.

ought not to be considered as appropriated to that work done by the plaintiff which was within the operation of s. 5. If the prior payment were not to be so appropriated, then the county court judge found that only 1*l.* was due to the plaintiff in respect of the cheque for 25*l.* The county court judge held that, if the prior payment of 20*l.* ought to be treated as appropriated to that work done by the plaintiff which was within the operation of s. 5, the plaintiff was entitled to judgment for 21*l.* The Divisional Court held that the plaintiff could recover only 1*l.*, but on a question of evidence which I need not consider, because I think there is a ground on which 21*l.* is recoverable—a ground which was not dealt with in the judgment of the Divisional Court, and appears not to have been present to their minds. At the time when the cheques were given by the defendant no appropriation was made by him. According to law, that left the right of appropriation to the plaintiff. It is clear that no appropriation was made by him before the action came on for trial the second time in the county court. The question is, whether at that time the plaintiff could appropriate. I think he could. *The Mecca* (1) shews that as a general rule in such a case the plaintiff is entitled to appropriate down to what is there called "the very last moment." What is "the last moment" must depend on the circumstances of each case. In the present case, there being no rights of third parties intervening, and under the peculiar circumstances which I have already pointed out, namely, that the question did not arise until the second trial, I think the plaintiff retained the right of appropriation until the second trial. At that trial he clearly exercised his right, and appropriated the 20*l.* cheque to payment for the work done within the operation of s. 5, and the 25*l.* cheque to the work done outside the operation of that section. That being so, the plaintiff is entitled to recover the 21*l.*

Under these circumstances the plaintiff's counsel has said that he does not desire to press his claim for the extra 4*l.*, and therefore we need not decide whether the Divisional Court came to a right conclusion on the main point in the case. But

(1) [1897] A. C. 286.

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it must not be supposed that I have come to the conclusion that their decision on that point was wrong.

The only remaining question is as to costs, and in my opinion the plaintiff has substantially succeeded, and he ought to have the costs of the proceedings. With regard to what the defendant's counsel said, namely, that the appropriation having been made so late, it is hard on the defendant that he cannot stand in a better position because he did not know the law, I wish to add that as the defendant did not appropriate when he made the payment, and, as he had no ground for thinking that the plaintiff had made any appropriation, he ought to have known that the plaintiff still possessed the right to appropriate, and he cannot complain that the plaintiff exercised that right in the way in which it is obvious that he would exercise it, in his own favour. I think, therefore, that the costs ought to follow the result in the usual way.

STIRLING L.J. I am of the same opinion, and substantially for the same reasons. With regard to the question whether the plaintiff was entitled to recover the full amount of the cheque for 25*l.*, it seems to me clear that s. 5 does not make it illegal for any person, although he is neither a registered dentist nor a legally qualified medical practitioner, to perform dental operations or to give dental attendance or advice within the meaning of that section. And it is obvious that the Divisional Court were of the same opinion, because if any of these matters had been illegal, the action upon the cheque must have failed entirely, and it would not have been remitted to the county court judge as it was. All that s. 5 does is to prevent a person from recovering any fees or charges unless he is registered under the Act or is a legally qualified medical practitioner. In these circumstances I desire not to express any opinion whether the plaintiff was or was not entitled to sue on the cheque and recover the whole amount. I have not been able to consider the matter fully or to arrive at a conclusion satisfactory to my own mind.

The question which remains is, whether the plaintiff was entitled at the second trial to make for the first time the

appropriation of the 20*l.* previously paid. Upon that point I have come to the same conclusion as my brethren—that the plaintiff was entitled to do so. In *The Mecca* (1) it was decided that, when no appropriation has been made by a debtor at the time of payment, the creditor is entitled to appropriate "up to the very last moment." That I think means until something has happened which prevents the creditor from exercising his right—some such event as, for instance, if the creditor has already made an appropriation and has communicated it to the debtor. By bringing an action the creditor may in fact shew that he has made an appropriation, and the very form of the writ may shew a communication of the appropriation to the debtor. And the same result may arise in other ways. In *Friend* v. *Young* (2), for instance, it was held that the form of a proof in bankruptcy by a creditor shewed that an appropriation had been made by him and amounted to a communication of it to the debtor. And in *Smith* v. *Betty* (3) an action was brought in which the defendant pleaded the Statute of Limitations, and at the trial an order was made by which an account was directed in substance excluding statute-barred items, and it was held that the form of that order also prevented a subsequent appropriation by the plaintiff of a particular payment to statute-barred items. I do not profess to give an exhaustive account of the circumstances which may preclude a creditor from exercising his right of appropriation. All that it is necessary now to say is that, until something has happened which would render it inequitable for the creditor to do so, he is at liberty to exercise his right. In the present case certainly nothing had occurred down to the second trial which rendered it inequitable for the plaintiff to exercise his right. The question whether anything had taken place which rendered it necessary or desirable for him to make the appropriation did not arise until the second trial. At that time there was no writ or pleading which debarred the plaintiff from exercising his right, and at the trial he did exercise it in answer to a question put to him by his counsel, and it seems

(1) [1897] A. C. 286. (2) [1897] 2 Ch. 421.
(3) [1903] 2 K. B. 317.

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to me that he was in no way precluded from so doing. This point does not appear to have been raised before the Divisional Court, and in these circumstances I think the plaintiff is entitled to judgment for 21*l.*, with costs in the usual way.

Appeal allowed.

Solicitors: *Wilkinson, Howlett & Wilkinson; Lumley & Lumley.*

W. L. C.

1905 *Feb.* 2.

POPLAR GUARDIANS *v.* MARTIN.

Poor Law—Wilful Refusal or Neglect of Person to maintain himself—Refusal of Offer of Work subject to Conditions—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

By s. 3 of the Vagrancy Act, 1824, a person who is able wholly or in part to maintain himself by work or by other means, and wilfully refuses or neglects so to do, by which refusal or neglect he becomes chargeable to the parish, is made liable to conviction as an idle and disorderly person.

An able-bodied pauper was offered work at a farm colony, in return for which he was to receive board and lodging and a small weekly payment; the offer was subject to certain conditions, (inter alia) that he would not only not enter any premises where intoxicating drink was sold, but would discourage others from doing so; that he would attend the meetings on Saturday nights of the particular body to which the colony belonged and special meetings fixed from time to time, and would attend some place of worship once on a Sunday. The pauper refused to sign an agreement embodying those terms and left the colony, and again became chargeable to the parish:—

Held, that, in considering whether the refusal of the pauper to accept work was reasonable, regard must be had to the conditions upon which the work was offered; that in order to constitute a wilful refusal or neglect within the meaning of the section the conditions attached to the offer of work must be such as relate to the work itself or to the workman's conduct in its performance; that the above-mentioned conditions, though not in themselves unreasonable conditions to attach to an offer of employment, were not such that a refusal to accept work on such conditions amounted to a wilful refusal or neglect on the part of the pauper to maintain himself, and that he was therefore not liable to be convicted as an idle and disorderly person.

CASE stated by a metropolitan police magistrate.

The respondent was charged on an information and warrant

for that he, being a person able wholly or in part to maintain himself by work or other means, did wilfully refuse or neglect so to do, by which refusal or neglect he became chargeable to the common fund of the Poplar Union.

The respondent was an able-bodied person of thirty-nine years of age, and on February 23, 1904, he was admitted to the Poplar workhouse. On April 13, 1904, he and ten other pauper inmates were taken by the labour master to the farm colony established by William Booth at Hadleigh in Essex for the reception and employment of destitute men. Under the terms of an agreement between the appellants and William Booth the respondent could have started work at the colony on probation, receiving as remuneration his food and lodging free and 6*d.* a week in the nature of pocket-money, and if the respondent had after two or three weeks been employed upon brickwork he could have earned 4½*d.* a yard for digging clay, at which rate of pay it was possible for some men to earn 30*s.* a week. He was told to go to work in the brickfield at the colony. It was not possible to do more than guess at the remuneration which he might have earned later on. These terms were explained to the respondent, and he was asked to sign an undertaking to conform to the rules of the colony; but he refused to work upon the said terms or to sign the undertaking, and left the colony. On April 18, 1904, he returned to the Poplar workhouse, and again became chargeable on the rates.

It was contended on behalf of the appellants that the respondent had rendered himself liable to conviction as an idle and disorderly person under 5 Geo. 4, c. 83, s. 3. The learned magistrate decided against this contention, but stated a case for the opinion of the Court, which was remitted to him by the Court to inquire whether the respondent did actually refuse wilfully to maintain himself. (1)

(1) When the case was originally before the Divisional Court the conditions upon which work at the farm colony was offered by the Salvation Army were not part of the special case, nor had they been considered by the learned magistrate in arriving at his decision; apparently they had not been brought to his notice. The Divisional Court held that, in considering whether a refusal to accept work was reasonable or not, regard

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On July 28, 1904, the parties again appeared before the magistrate, when the evidence already set out was repeated, and it was further proved that on April 13, 1904, the respondent came to the colony, and that on the next day one Charles Durman handed to him a form of agreement to sign, and that the respondent refused to sign the agreement or to work upon the terms thereof. The respondent would not have been allowed to work at the colony except upon his agreeing to all the terms of the agreement. He assigned no reason for his refusal, except that the remuneration was insufficient. He stated that he was a member of the Church of England, and it was proved that there was a church of the Church of England which he could have attended.

The learned magistrate was of opinion that the conditions contained in the agreement by which the colonist was required to undertake to discourage other colonists from entering premises where intoxicating liquors were sold and was to attend the Saturday night roll-call and other special meetings, which were explained to be a form of church parade, and was to attend some place of worship once on a Sunday, were not reasonable conditions to be attached to his employment, and that the respondent was justified in refusing to work on those conditions, and was therefore not guilty of the offence charged.

The question for the opinion of the Court was whether the conditions contained in the agreement and referred to in the case were reasonable or not.

The material portion of the agreement which every colonist was required to sign was in the following terms: "I agree to obey all the rules and regulations made for the good conduct and management of the colony, and to carry out all the instructions which may be given me by the officers and superintendents under whom I work. I promise to abstain from all intoxicating drink whilst resident on the colony; and I pledge myself not to enter any premises where intoxicating drink is sold, and to discourage others from doing so. I also promise to abstain

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must be had to the conditions upon which the work was offered, and the case was accordingly remitted to the magistrate for rehearing with a direction to that effect.

from the use of all profane or obscene language whilst on the colony. I promise to attend the Saturday night roll-call meetings in the Citadel, and any special meetings which may from time to time be arranged by the governor of the colony. I also promise to attend some place of worship once on a Sunday."

Colam, for the appellants, contended that there had been a wilful refusal to work on the part of the pauper, and that the conditions attached to the offer of employment were not unreasonable.

[LORD ALVERSTONE C.J. referred to *Carpenter* v. *Stanley*. (1)]

The respondent did not appear.

LORD ALVERSTONE C.J. The question raised by this case is one of considerable difficulty. The question which we have to consider is whether the respondent, being able wholly or in part to maintain himself, or his family, by work or other means, wilfully refused or neglected to do so, by reason of which refusal or neglect he became chargeable to the parish. He was offered work in return for his food and lodging and 6*d*. a week pocket-money, and conditions in many respects most salutary and useful were attached to the offer; for instance, that the money made by his work was to go to a fund in which he had an interest, though what his exact interest was we are not informed; and it further appeared that if he stayed in the employment he might become qualified to earn a higher rate of wages in a short time. Taking these facts by themselves, and if there had been nothing else in the case, I should hesitate before coming to the conclusion that a man who was offered without restriction employment of that kind, and who declined it, had not wilfully refused to work. It is true that the respondent objected to the rate of pay as insufficient, and if under the circumstances it appeared that the pay, the food, or the lodging offered him were such as to shew that he was not getting a substantial remuneration for his work, there might be good ground for his refusal to work; but that is not the case here.

(1) (1868) 33 J. P. 37.

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Lord Alverstone C.J.

There were other conditions attached to the man's possible employment, and the learned magistrate has thought that the conditions were either unreasonable as a whole, or were such that the refusal to comply with them did not amount to a wilful refusal by the respondent to do work which would help him wholly or in part to maintain himself within the meaning of the section we are considering.

I do not wish to be understood as expressing an opinion that the conditions in question are in themselves unreasonable; if a man goes to a colony of this kind I do not think it unreasonable that he should be asked to report himself or to attend meetings, or to put himself under certain restrictions as to intoxicating liquors, but, when we are dealing with a criminal offence, that is not the test which we ought to apply. It being necessary to draw the line at some point, I think that the conditions imposed should be conditions which affect the man's work; and if the terms on which he is offered work are reasonable with reference to the work which he is called on to do, we ought to hesitate before holding that he was justified in refusing to do work offered him on such conditions. Instances of reasonable conditions are easy to suggest; for instance, to come to his work at certain hours, to obey orders relating to his work, to observe the hours for meals, to conduct himself properly during working hours and in connection with his work. But I doubt whether, in considering a question arising under s. 3, we have a right to say that the Court may regard conditions which are imposed on a man and made obligatory on him, but which have no relation to his work at all. For example, attendance on Sunday at some place of worship is a thing which is proper in itself and should be encouraged, and I can see no objection whatever to the respondent's attending the meetings of the particular organization which offered him the work; and similarly anything that would promote the cause of temperance is an admirable thing in itself and one which a judge would be the last person in the world to consider unreasonable; on the other hand, I doubt whether any of these matters ought to enter into our consideration when we are dealing with a criminal charge of

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refusing to work. However beneficial such conditions are in themselves, they have no relation to the man's work or to the question whether the man is willing to work, and without going so far as the learned magistrate, who seems, from the statement in the case, to have thought these conditions unreasonable, they are not in my opinion such as can properly be taken into consideration where a man is charged under this section with wilfully refusing to work. The decision of the magistrate must therefore be upheld, and the appeal dismissed.

KENNEDY J. I am of the same opinion, and need add but little to the judgment of my Lord, in which I entirely concur, because I expressed the same view on the previous occasion when this case came before us. I need only say that while I have nothing but admiration for this particular scheme in this particular colony for encouraging men to work and at the same time keeping them under wholesome discipline and reasonable restraint, yet, when one approaches the present question, one must be careful to consider whether one can properly hold that the refusal of a man to enter the particular establishment and make himself subject to the particular rules and regulations is so unreasonable that one should treat as an offence against the law the result of his refusal, as amounting to a wilful refusal or neglect to wholly or partly maintain himself. It is no reflection upon the excellent work of the particular institution if we decline to treat a refusal to enter it as involving that which can be punished criminally. Speaking broadly, I see nothing to object to in any reasonable rules which would apply, not only to the kind of work and the hours of work, but also (for example) to the man's conduct during the working hours and in coming to and going from his work. But while in this particular case there may be nothing which most men would dispute to be reasonable, I do not think that it would be right to hold that the man must attend whatever religious meetings may be held; and, further, although it may be difficult to draw the line, I think that, while sobriety and abstinence from drink is a very reasonable thing for the man himself, it is not desirable that he should be made, at the discretion of his

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Kennedy J.

superiors, a wrong-doer unless he carries out the duty of preaching to others as well as restraining himself. I therefore concur that this appeal must be dismissed. I wish it to be understood that I do not think that the mere existence of particular rules of discipline relating to work or working hours is any bar to a magistrate coming to a different conclusion in proceedings similar to the present.

RIDLEY J. I agree. The question is one of some importance. The regulations of this colony are such that, in my opinion, no objection could properly be taken to them; indeed, they are worthy of our admiration. But the question is whether in this case, and in other cases where similar regulations are in force, a person who refuses to abide by them ought to be held to be wilfully refusing or neglecting to accept work which is offered to him on those conditions. It is difficult to suggest where the line is to be drawn unless we adopt the suggestion of my Lord, that the regulations or conditions must have some relation to the work offered him or to the wages which he is to receive for it or to his conduct in its performance. That is a simple test, and any attempt to go beyond it would give rise to many difficulties.

Appeal dismissed.

Solicitors for appellants: *C. V. Young & Son.*

W. J. B.

[IN THE COURT OF APPEAL.]

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1905
March 3, 11, 13.

In re CARTER & ELLIS. *Ex parte* SAVILL BROTHERS.

Bankruptcy—Leasehold Property of Bankrupt—Mortgage by Underlease—Disclaimer by Trustee—Vesting Order—Terms to be imposed on Underlessee—Discretion of Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-ss.* 1, 2, 6—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

On March 1, 1904, seven leases of seven houses, for the respective terms of ninety-nine years, were granted to lessees, who had erected the houses under a prior building agreement. Each lease reserved a small ground-rent. None of the leases contained any restriction on the lessees' right to assign. On the same day the lessees mortgaged all the houses by way of underlease for the respective residues of the several terms, except the last day of each term, to secure the sum of 1864*l.*, with interest.

On March 24, 1904, a bankruptcy petition was filed against the lessees, and on April 19, 1904, they were adjudicated bankrupts.

On November 10, 1904, the trustee in the bankruptcy disclaimed all his interest in the seven leases. There had been no breach of any of the lessees' covenants in the leases :—

Held, that under the circumstances the Court ought to exercise its discretion under s. 13 of the Bankruptcy Act, 1890, by making an order vesting the disclaimed property in the mortgagees, "subject only to the same liabilities and obligations as if the leases had been assigned to them at the date when the bankruptcy petition was filed."

If in such a case the exercise of the discretion in favour of the mortgagee will place him in no better position, and will place the lessor in no worse position, than if there had been no disclaimer, the discretion ought to be exercised in favour of the mortgagee.

Appeal from a decision of one of the registrars in bankruptcy.

On March 1, 1904, the Coopers' Company granted to George Carter and Henry Ellis seven leases of seven houses respectively situate in Beckton Road, West Ham, for the respective terms of ninety-nine years from December 25, 1893. Each lease reserved a small ground-rent, and none of the leases contained any restriction upon the right of the lessees to assign, except that a copy of any assignment or mortgage was to be delivered to the lessors' solicitor within one month after the execution thereof, and the original produced to him, and

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the fee of one guinea paid to him for the registration of the assignment or mortgage. The leases were granted in pursuance of a prior agreement under which the houses had been erected by the lessees.

On the same day, March 1, 1904, the lessees mortgaged all the houses to Savill Brothers, Limited, by underleases of the houses respectively for the respective terms of ninety-nine years, except in each case the last day of the term. The mortgage was made to secure the sum of 1864*l.*, with interest.

On March 24, 1904, a bankruptcy petition was filed against Carter & Ellis, and on April 19, 1904, they were adjudicated bankrupts.

On November 10, 1904, the trustee in the bankruptcy executed a disclaimer of all his interest in the seven leases.

On the application of the Coopers' Company the registrar on February 14, 1905, made an order that, "unless Savill Brothers, Limited, do within" the time therein mentioned "elect to accept and apply for an order vesting in them the said premises, and making them subject to the same liabilities as the bankrupts were subject to under the leases in respect of the premises at the date of the filing of the petition, they shall be, and are hereby, excluded from all interest in and security upon the said premises."

Savill Brothers were willing and had offered to accept a vesting order on the terms mentioned in s. 13 (1) of the Bank-

(1) By s. 55 of the Bankruptcy Act, 1883, "(1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee disclaim the property. . . ."

"(2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose

ruptcy Act, 1890, i.e., making them subject only to the same liabilities and obligations as if the leases had been assigned to them at the date of the filing of the bankruptcy petition.

Savill Brothers appealed.

Astbury, K.C., and *Hansell*, for the appellants. It is submitted that a vesting order should have been made in the terms mentioned in s. 13 of the Bankruptcy Act, 1890, i.e., making the appellants liable upon the covenants in the leases to the same extent only to which they would have been liable if the

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of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

"(6.) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and, on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in, and security upon the property, and, if there shall be no person claiming under the bankrupt, who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt."

By s. 13 of the Bankruptcy Act, 1890, "The Court may, if it thinks fit, modify the terms prescribed by the proviso in sub-s. 6 of the same section (i.e., s. 55 of the Bankruptcy Act, 1883), so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order."

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leases had been assigned to them on the day of the filing of the bankruptcy petition. Sub-s. 2 of s. 55 of the Bankruptcy Act, 1883, shews that the intention of the Legislature was that the trustee's disclaimer should not affect the rights or liabilities of third parties, including therefore an underlessee or a mortgagee by sub-demise. The registrar's order very seriously affects the rights and liabilities of the appellants, as was pointed out by Lindley L.J. in *In re Finley*. (1) The object of making a mortgage of a leasehold interest by way of underlease is that the mortgagee may escape from liability upon the lessee's covenants in the original lease; and this object is frustrated and the position of the mortgagor is entirely changed for the worse by an order in the form provided by s. 55, sub-s. 6, of the Bankruptcy Act, 1883. That is the order which the registrar has made. The effect of that order is that the appellants will lose their security altogether, unless they are willing to assume the liabilities of the bankrupts under the original leases. They will be liable under the covenants during the whole of the term of ninety-nine years, even if they should realize their security and assign the property. They will be worse off than if they had taken their security by an assignment of the lease, for then they could have got rid of future liability by assigning the lease to a pauper. Probably the reason why s. 13 of the Bankruptcy Act, 1890, was enacted was that it had been pointed out in *In re Finley* (1) what hardship an order as provided by s. 55, sub-s. 6, of the Bankruptcy Act, 1883, would cause to a mortgagee by underlease.

Under s. 13 the Court has a discretion, and it is submitted that the discretion should be exercised in such a way as to do what is right to both parties—the lessor and the underlessee—and not to give an exceptional benefit to one of them.

The only case which has yet been decided upon s. 13 is *In re Walker*. (2) In that case breaches of the lessee's covenants had been committed before the bankruptcy, and a right of re-entry had accrued to the lessor, and, that being so, Vaughan Williams J. thought that he ought not to exercise the dis-

(1) (1888) 21 Q. B. D. 475, at pp. 486, 487. (2) (1895) 64 L. J. (Q.B.) 783.

cretion given by s. 13 so as to deprive the lessor of his right of re-entry. But the learned judge made use of his power for the purpose of imposing terms on the parties, and a vesting order was made, as provided by s. 55, sub-s. 6, of the Bankruptcy Act, 1883, upon the terms that the lessor should at any time accept a surrender, upon the mortgagee giving six months' notice in writing and performing all the covenants and obligations of the lease down to the date of disclaimer. In the present case there had been no breaches of the lessees' covenants before the bankruptcy, and no injury will be done to the lessors by making an order under s. 13. The lessors took the risk of their tenants becoming bankrupt; it is not the fault of the mortgagees that they have done so, and the mortgagees ought not because of the bankruptcy to have a greater burden imposed on them.

If the discretion of the Court under s. 13 cannot be exercised in the present case, it is impossible to conceive of any case in which it could be exercised. By making the order contemplated by that section the lessors will not be deprived of any right which they would have had if there had been no disclaimer. The mortgagees did not apply for a vesting order; the lessors sought to impose it upon them.

Upjohn, K.C., and *Wace*, for the Coopers' Company. After the decision in *In re Walker* (1), it cannot be disputed that as an ordinary rule a vesting order ought to be made on the terms mentioned in sub-s. 6 of s. 55. Under that sub-section the Court had no discretion in the matter, but the persons who took the vesting order must become subject to the liabilities to which the bankrupt was subject under the lease. Sub-sect. 6 has not been repealed, but s. 13 of the Bankruptcy Act, 1890, gives the Court a judicial discretion to modify the terms imposed by sub-s. 6 of s. 55. The onus must be on those who desire that this discretion should be exercised to shew some reason why it should be exercised. The appellants have filed no evidence as to this; they have not even alleged any ground for modification of the ordinary terms.

It is submitted that, as Vaughan Williams J. said in *In re*

(1) 64 L. J. (Q.B.) 783.

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Walker (1), s. 13 was intended for the relief of an underlessee or mortgagee in hard cases. Suppose, for instance, that these bankrupts, instead of taking seven leases of the seven houses, had taken one lease of all the seven, and had then mortgaged one of the houses by underlease, it would be hard upon the mortgagee if, in order to keep his security, he must on taking a vesting order become liable on the lessees' covenants in respect of all the seven houses though his security was upon one house only, and he had no interest in the other houses. This is a case of the kind to which the discretionary power was intended to apply. Suppose, again, there had been a breach of covenant which was not continuing—a breach of a covenant to lay out a specified sum of money in improving the demised premises—and the lessor had waived the right of re-entry by accepting payment of rent, it would be monstrous to compel an underlessee to perform that contractual obligation of the lessee for the breach of which the lessor had lost his right of re-entry. That would be a case for the exercise of the discretion under s. 13.

It is submitted that if ever there were a case in which the terms mentioned in s. 55, sub-s. 6, should be imposed, the present case is one. The seven houses are granted each for a term of ninety-nine years and at a small ground-rent. The present value of the total of the seven ground-rents is about 600*l.*, and the mortgage debt is 1864*l.*, and this shews that for many years to come the real value of the property will belong to the mortgagees, and that practically there will be no liability under the lease. If a mortgagee has the ownership and the real enjoyment of a house, subject to the payment of a small ground-rent, it is not fair to the lessor that towards the end of the term he should be able to get rid of all liability by assigning the lease to a pauper. If at the end of the term there should be breaches of covenant, it would be practically impossible to prove that they occurred before the assignment. The houses were let at small ground-rents because the lessors were at the end of the long term to get back their land improved by the existence upon it of good and substantial houses—not houses

(1) 64 L. J. (Q.B.) at p. 786.

in ruins. It must not be forgotten that the first effect of a disclaimer is to leave the lessor without a lessee, and without any one liable to him upon the covenants in the lease.

[VAUGHAN WILLIAMS L.J. If the lessor reserved no power of re-entry on the bankruptcy of the lessee, the underlessee would have been unassailable so long as he paid the ground-rent and performed the covenants. If a mortgagee by sub-demise is entitled in every case to a vesting order on the terms of being liable on the covenants in the lease only as if he had been an assignee, the practical result is to repeal s. 55, sub-s. 6, of the Bankruptcy Act, 1883—not to modify it.

STIRLING L.J. The lessor would be able to re-enter as soon as the assignee committed a breach of covenant.]

The lessor would be involved in litigation. The power given to the Court by s. 13 is discretionary, and the Court of Appeal will not interfere with the exercise of this discretion by the registrar unless he proceeded on a wrong principle.

Astbury, K.C., in reply. If before the Bankruptcy Act, 1869, a lessee had become bankrupt, the lessor could not have interfered with an underlessee: Co. Litt. 19th ed. vol. ii. 338 b; *Doe* v. *Pyke*. (1) And statutory force was given to that doctrine by the Act 8 & 9 Vict. c. 106. An underlessee was in a better position than an assignee of the lease. The Bankruptcy Act, 1869, did not alter the position of an underlessee: *Smalley* v. *Hardinge*. (2) In *In re Walker* (3) a right of re-entry for breach of covenant had accrued to the lessor, and if the Court had made a vesting order as contemplated by s. 13 of the Bankruptcy Act, 1890, that vested right of re-entry would have been destroyed. In the present case the lessors will be in no way injured by making such an order, and if the Court cannot in this case exercise its discretion in favour of the mortgagees it is difficult to conceive a case in which it could do so.

Cur. adv. vult.

March 13. VAUGHAN WILLIAMS L.J., after stating the order of the registrar, continued:—The question we have to

(1) (1816) 5 M. & S. 146, 154; 17 R. R. 296.

(2) (1881) 7 Q. B. D. 524.

(3) 64 L. J. (Q.B.) 783.

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determine is whether, having regard to the state of things recited in the order, that order of the learned registrar was a right order to make. The contention of the appellants is that under the circumstances the order which should have been made was not an order excluding them from all interest in the leasehold premises unless they were willing to assume the position and liabilities of the original lessees, but that it should have been an order in pursuance of the provisions contained in the latter part of s. 13 of the Bankruptcy Act, 1890, namely, an order vesting the premises in the appellants, "subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed." In my judgment the order of the learned registrar was not the right order, and I think the contention of the appellants is substantially right. Sect. 55 of the Bankruptcy Act, 1883, and s. 13 of the Bankruptcy Act, 1890, taken together, are not very easy to construe, and I can well understand the difficulty which may have presented itself to the mind of the learned registrar when he was asked to apply these two sections to the present case. I do not propose now to determine or to express any opinion upon anything which is not absolutely necessary for the decision of the present case.

Before dealing with the sections in detail, I will state generally the ground of my decision. In my opinion the intention of the Legislature in cases of disclaimer by a trustee in bankruptcy clearly appears to have been, while they were providing for the relief of the trustee from liability in respect of onerous obligations of the bankrupt, including the obligations arising under a lease, to do so with as little disturbance as might be of the rights and liabilities of third persons by reason of the disclaimer. That appears by sub-s. 2 of s. 55 of the Bankruptcy Act, 1883. [The Lord Justice read sub-s. 2.] The basis of my judgment is that the registrar's order does affect the rights and liabilities of the appellants in a way which is not "necessary for the purpose of releasing the bankrupt and his property and the trustee from liability."

Under these circumstances I must consider whether the order asked for by the appellants, namely, an order making them

"subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed," will really carry out the intention of the Legislature as declared in sub-s. 2 of s. 55, and will do so without causing any injustice to the lessors. In my judgment, such an order will best carry out the intention of the Legislature as declared in sub-s. 2, and will inflict no injustice upon the lessors. Now at common law, if there were a lease and a sub-lease, and for any reason whatever the lease became extinguished, the sub-lease also disappeared: the branch fell with the tree. But the Legislature stepped in to some extent I think, although I am not quite sure about it, in the reign of George IV.; but, at all events, by s. 9 of the statute 8 & 9 Vict. c. 106, provision was made for preserving the rights of the sub-lessee in cases in which a voluntary surrender of the lease had been accepted by the lessor. By the Bankruptcy Acts prior to 1869 no particular provision was made for disclaimer. The assignee in bankruptcy was not bound to accept a damnosa hæreditas, and leases were left outside the property which passed to the representative of the creditors. This led to a great deal of complication and difficulty and litigation, and by the Bankruptcy Act, 1869, further provision was made for the disclaimer of leases by the trustee in a bankruptcy. To put it shortly, the disclaimer was by s. 23 of that Act expressly made to operate as if there had been a voluntary surrender of the lease on the date of the order of adjudication.

No doubt that provision was inserted for the express purpose of preserving the rights of sub-lessees and others claiming under the bankrupt lessee. But that provision was not found to work perfectly well, and when the Bankruptcy Act of 1883 was passed s. 55 was substituted for s. 23 of the Act of 1869. The words which provided that the disclaimer should operate as a surrender are omitted in s. 55 of the Act. Sub-s. 1 of s. 55 deals with the disclaimer of onerous property by the trustee, and enables him, "notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto," to disclaim the property within a limited time. Then comes

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sub-s. 2, to which I have already referred. The Legislature, however, did not content themselves with merely making the declaration contained in sub-s. 2, but, to enable effect to be given to that declaration, they made the further provisions which are contained in sub-s. 6. The first clause of sub-s. 6 deals with onerous property generally, and provides for the making of "an order for the vesting of the disclaimed property in or the delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for liability." This first clause of sub-s. 6 is introduced for the purpose of working out as regards onerous property generally the declaration of the Legislature contained in sub-s. 2. Then, having dealt thus with onerous property generally, the proviso in sub-s. 6 goes on to deal with the particular case of leases, and it says: "Provided always that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed." If that sub-section had remained unmodified, the order made by the learned registrar would, I think, have been perfectly right. But, by reason of cases which came before the Court, it soon became apparent that to make the underlessee or other person claiming through the bankrupt lessee accept all the liabilities of the lease, or else be excluded from all interest in and security upon the property, might work injustice, and might really be a most grave departure from the declaration of the Legislature in sub-s. 2 that the disclaimer should not, except so far as necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights and liabilities of other persons. This being so, the Legislature proceeded in 1890 to enact s. 13 of the Bankruptcy Act of that year.

I do not read that section as a repeal of the proviso in sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, nor do I read

s. 13 as making it obligatory upon the Court in all cases of a character falling within the proviso in sub-s. 6 of s. 55 to make an order putting the sub-lessee or other person claiming through the bankrupt lessee in a position in which he will be "subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed." The Court, in my opinion, has always a discretion in the matter, and when I was sitting in the Court of Bankruptcy I had to construe this s. 13 in *In re Walker*. (1) That was a case in which the real question at issue between the parties was whether the vesting order ought or ought not to leave the person in whom the leasehold property was to vest subject to liabilities which had accrued by reason of past breaches of covenant. I thought that in that case it would be unjust that that person should take the property subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed. I acted upon that view, and declined to make the order contemplated by s. 13, but made the order as provided by s. 55, sub-s. 6, on the lessor accepting certain conditions which were embodied in my order. I do not refer to that case as affecting the present case further than this—that I was then of opinion that s. 13 did not make it obligatory upon me to make the vesting order as upon an assignment of the lease, but it gave me a discretion whether I would make the order or not. And I was prepared to make the order if the lessor who desired the vesting order to be made under s. 55, sub-s. 6, had not been willing to accept some conditions which I thought essential to doing justice between the parties. Before parting with the discussion of s. 55 and s. 13, I desire to say that I am not at present satisfied that the person to whom the vesting order is offered at the time when the application of the landlord is being heard is entitled to say that for all purposes the onus of proof must be thrown upon the landlord, and that for no purpose can the sub-lessee or other person having an interest derived under the lease be treated as an applicant. I do not think I need decide

(1) 64 L. J. (Q.B.) 783.

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any such question now, and I do not propose to decide it; but I am not at present satisfied that the argument which has been addressed to us as to the position of the sub-lessee is sound.

Now, asking myself the question whether an order vesting this property in the mortgagees by sub-demise ought to be made in the shape contemplated by s. 13, that is, placing them in the position of assignees of the lease, subject only to the same liabilities and obligations as if the lease had been assigned to them at the date of the filing of the bankruptcy petition, I ask whether that order will give the mortgagees anything more than they would have had if there had been no disclaimer? In my opinion, so far as the mortgagees by sub-demise are concerned, to make them now assignees of the lease as at the date of the petition will give them nothing more than they would have had if there had been no disclaimer by the trustee. In these particular leases there is no restriction whatever on assignment by the lessees. There is only a provision that any assignment is to be registered at a particular time at the office of the lessors' solicitor; but, apart from that, the lessees have an absolute right to assign. And it seems to me that, if the lessees had assigned the leases to the mortgagees by sub-demise, the lessors could not have in any way interfered or complained. Moreover, as it seems to me, the position of the sub-lessees on becoming assignees of the leases would have been substantially identical with the position in which they will be placed if an order is made in their favour under the power conferred by s. 13. But, even if that were not the case (and I express my opinion most positively that it is the case), it is perfectly manifest that the order which the registrar has made would put the mortgagees by sub-demise in a very much worse position than that in which they would have been in if there had been no disclaimer by the trustee. When one has considered in this way the position of the mortgagees by sub-demise, and has arrived at the conclusion that no profit—no improvement in position—would be given to them by making an order under the power conferred by s. 13, I do not think that is all which it is incumbent upon the

Court to consider. The Court has, as I have already said, a discretionary power in giving effect to the provisions of s. 13. Having that discretion, I think the Court ought to go a step further, and ask whether, notwithstanding that the position of the mortgagees by sub-demise will not be improved, yet it may not be that some injustice will be done to the lessors. In my judgment, it is quite as obligatory upon the Court to see that no such injustice is done as it is to avoid, if possible, giving a profit or advantage to the mortgagees by way of sub-demise by the order which the Court is making. Asking myself that question, I cannot see, having regard to the terms of these leases, that any injustice will be done to the lessors. Of course, it was open to the lessors at the time when the leases were granted to have inserted provisions which would have put them in a better position than they are put, in the event of the lessees either wishing to assign or becoming bankrupt. But the parties to this bargain have not chosen to insert any such provision in the leases. Under these circumstances I come unhesitatingly to the conclusion that no injustice will be done to the lessors by making the order for which the appellants ask. And when once one comes to the conclusion that the mortgagees by sub-demise will obtain no undue advantage by the order, that is, no improvement in their position, as compared with what it was potentially under the lease and the sub-demise, and when one also comes to the conclusion that no injustice will be done to the landlords, it follows almost necessarily that the judicial discretion of the Court ought to be exercised by making the order which is contemplated by s. 13.

The result, therefore, is that the registrar's order will be reversed, and an order will be made vesting these leases in Messrs. Savill Brothers, subject only to the same liability and obligations as if the leases had been assigned to them at the date when the bankruptcy petition was filed.

At the end of s. 13 there are these words: "and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order." In this particular case no question aisres as regards those words.

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STIRLING L.J. I have arrived at the same conclusion. I intend to decide simply that, in my opinion, this is a case in which the discretion given to the Court by s. 13 of the Bankruptcy Act, 1890, may be properly exercised in favour of the mortgagees. I arrive at that conclusion upon a consideration of all the circumstances of the case. [The Lord Justice stated the facts, and continued:—]

Within two months from the granting of the leases and the execution of the mortgage the lessors found that they had got bankrupt tenants, and the mortgagees found that they had bankrupt mortgagors. There is no evidence that due care was not exercised by both parties—by the one in granting the leases, and by the other in making the advance.

This being the state of things, the trustee in the bankruptcy saw fit to disclaim the property. It may therefore be assumed that, so far as he is concerned, the equity of redemption is in the nature of a damnosa hæreditas.

Then the lessors made an application under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, that an order might be made excluding the mortgagees from all interest in and security upon the property unless they would accept an order vesting the leases in them "subject to the same liabilities and obligations as the bankrupts were subject to under the leases in respect of the property at the date when the bankruptcy petition was filed"; and an order to that effect has been made by the learned registrar. It is only necessary to add that the houses are new houses, and that the rent has been paid and the covenants have been performed up to the present time. There is, therefore, no question of any right of the lessors to enter in respect of any breach of covenant.

This being so, the question we have to consider is, whether that order of the registrar ought to stand, or whether the discretion conferred by s. 13 of the Act of 1890 should be exercised in favour of the mortgagees. Now the position of the matter as it stood under the Act of 1883 was considered by the Court of Appeal in *In re Finley* (1), in which the judgment of the Court was delivered by Lindley L.J. He pointed out

(1) 21 Q. B. D. 475.

the striking results which followed from the provisions of sub-s. 6 of s. 55 of the Act of 1883. He said (1): "Whether the application is made by the sub-lessee or by the original lessor, in either case the vesting order can only be made in favour of the sub-lessee, subject to the covenants and conditions of the original lease, and, if the sub-lessee will not take the property on those terms, which, of course, he need not do, then these consequences appear to follow: First, the sub-lessee will be excluded from all interest in the disclaimed property. Whether the latter part of the proviso in clause 6 will apply will depend upon whether there is any such person as is there referred to. There may or may not be. If no vesting order is made the lease will be determined under sub-s. 2, the sub-lease will be determined under sub-s. 6, and the lessor will take the property freed from both lease and sub-lease. This appears to us to be the logical consequence of the Act, and it is impossible not to see that it is a very startling result. It will very seriously affect the old practice of taking securities on leasehold property by way of sub-demise, the whole object of which was to prevent the mortgagee from becoming liable to the rent and to the covenants and obligations of the original lease." Now in that state of things the Act of 1890 was passed. What does it do? [The Lord Justice read s. 13.] Two things seem to me to deserve notice with regard to that section. First, the operation of the section is somewhat narrow in its scope. Lindley L.J. in the passage which I have just read pointed out that the provisions of sub-s. 6 of s. 55 of the Act of 1883 would seriously affect the practice of taking securities on leasehold property by way of sub-demise, and that the whole object of that mode of taking a mortgage was to prevent the mortgagee from becoming liable to the rent and to the performance of the covenants of the original lease. The mortgagee on lending his money only wanted good security for it, and had no intention of taking on himself the performance of the duties of a lessee. But the Legislature has not seen fit to give the Court any power to put the mortgagee back in his old position. The sole choice is between taking a vesting order "subject

(1) 21 Q. B. D. at p. 486.

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to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed," and taking the order "subject only to the same liabilities and obligations as if the lease had been assigned to him at that date." The second point which I think deserves notice is the very wide discretion which is given to the Court. Sect. 13 simply provides that the Court may, if it thinks fit, modify the terms prescribed by the proviso to sub-s. 6 in the way specified; no particular class of cases to which that section is to apply is pointed out. There is no limitation of the discretion, except that it is to be a judicial discretion.

Now, that being so, what ought to be done in the present case? The choice, as I have already said, is between making the vesting order subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date when the bankruptcy petition was presented, or making the order subject to the same liabilities and obligations as if the lease had been assigned to the sub-lessee at that date. In the one case the lessors will get a solvent tenant liable for a term of ninety-nine years to the payment of the rent and the performance of the other covenants in the leases. The performance of those covenants will in the end be a more serious matter than the payment of the rent. In the other case the lessors will only have a solvent person who will be responsible for the payment of the rent and the performance of the covenants during the period for which he occupies or continues to be assignee of the property, and who will afterwards be at liberty (as any other assignee of the bankrupt would be) to assign over the leases as he may see fit without any restrictions.

Now, having regard to all the facts of this case, I ask, which of the two alternative orders would work the better justice? I think that if the lessors were to get solvent tenants, who happen in this case to be a corporation, and whose personal liability, therefore, may be very readily enforceable after the expiration of the term of ninety-nine years, placed in the position of their old tenants, the lessors having granted the leases

and the mortgagees having taken their mortgage on the same day, most people would say that the lessors in such a case, having solvent tenants in place of the old insolvent tenants, would be very lucky indeed and the mortgagees very much the reverse. In my judgment, in all the circumstances of this case, the greater justice will be done if we exercise our discretion in favour of the mortgagees, and say that they are to be "made subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed."

SIR GORELL BARNES, PRESIDENT. The appellants contend that they ought to have an order vesting the disclaimed property in them "subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed." The lessors contend that the appellants ought to take a vesting order "subject to the same liabilities and obligations as the bankrupts were subject to under the leases in respect of the property at the date when the bankruptcy petition was filed." In the circumstances of this particular case, which have been fully stated by my brother Stirling, the contention of the appellants appears to me to be right. I cannot see that any injustice will be done to the lessors by acceding to the appellants' contention, whereas, in my view, the order of the registrar imposes unreasonable terms on the appellants, and places them in a position which is contrary to the intention of the Legislature as shewn by sub-s. 2 of s. 55 of the Act of 1883. I agree, therefore, with the judgments which have been pronounced.

Appeal allowed.

Solicitors: *Sandilands & Co.; E. L. Boyer.*

W. L. C.

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March 29.

[IN THE COURT OF APPEAL.]

PICKFORDS, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Rate for Carriage of Goods—Rate-book—Railway Commissioners —Order for specification of Details of Expenses—Amounts charged for Services other than Conveyance — Regulation of Railways Act, 1873 (36 *&* 37 *Vict. c.* 48), *s.* 14.

A railway company, against whom an order has been made by the Railway Commissioners under the Regulation of Railways Act, 1873, s. 14, is bound to specify the particular amounts charged in a rate for the carriage of goods in respect of each of the services performed by them other than conveyance on their line.

Colman v. *Great Eastern Ry. Co.*, (1882) 4 Ry. & Can. Cas. 108, and *Birchgrove Steel Co.* v. *Midland Ry. Co.*, (1887) 5 Ry. & Can. Cas. 229, approved.

APPEAL from the decision of the Railway and Canal Commission (Bigham J., Sir Frederick Peel, and Viscount Cobham) as after mentioned.

Pickfords, Limited, who were carriers, had made an application to the Railway Commissioners complaining of an undue preference by the railway company of their own traffic as against that of Pickfords, Limited, and asking for an order under the Regulation of Railways Act, 1873, s. 14, requiring the railway company to distinguish in the rate-books kept by them at their Broad Street station in London and their goods station at Bradford how much of each of the rates mentioned in a schedule to the application was for conveyance on their railway, and how much was for other expenses, specifying the nature and details of such other expenses; and the Commissioners had made the order for which the applicants asked. The railway company had, in pursuance of the order of the Commissioners, given particulars to Pickfords, Limited, in

respect of each of the rates in the schedule, of which particulars the following may be taken as an example:—

Description of Traffic.	Stations.		Rate, including Collection and Delivery. Per ton.	For Conveyance.	For other Expenses.	Nature and detail of such other Expenses.
	From	To				
			s. *d.*	*s.* *d.*	*s.* *d.*	
Soap.	Bradford.	Dewsbury.	7 10	2 10	5 0	Provision of station at each end. Loading and unloading. Covering and uncovering. Collection and delivery.

It appeared that Pickfords, Limited, were in the habit of doing their own cartage to and from railway stations. They were not satisfied with the particulars given by the railway company in pursuance of the order of the Commissioners, because they did not specify the particular amounts charged by the railway company in respect of each of the other expenses mentioned in the rate, and consequently they could not ascertain therefrom what rebate ought to be made to them in respect of collection and delivery. They therefore made a further application to the Railway Commissioners on the ground that the railway company had not sufficiently complied with their order under the Regulation of Railways Act, 1873, s. 14.

Bigham J., in delivering the judgment of the Commissioners, said that but for previous decisions of the Railway Commissioners on the subject he should have been of opinion that there had been a sufficient compliance by the railway company with the order; but that the present Master of the Rolls, then Collins J., when presiding over the Railway Commission, had laid it down, in the case of *Didcot, Newbury and Southampton Ry. Co.* v. *Great Western Ry. Co.* (1), that the decisions of the Commission from its commencement, without reference to the change which had taken place in its constitution, ought to

(1) (1896) 9 Ry. & Can. Cas. 210, at p. 229.

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be regarded as binding upon it; and he therefore held, in conformity with the previous decision of the Commission, in *Colman* v. *Great Eastern Ry.* (1), that the railway company had not sufficiently complied with the order of the Commissioners.

Cripps, *K.C.*, and *W. J. Noble* (*Moon*, *K.C.*, with them), for the railway company. The present application is under s. 14 of the Regulation of Railways Act, 1873, and it is with the provisions of that section alone that the Court has to deal on this appeal. That section relates only to the particulars which the railway company may be ordered to insert in the rate-books which they are bound to publish for the information of the public at large. It is submitted that, upon the true construction of the section, the railway company are not bound to state the amount charged for each of the services rendered by them other than conveyance. The words "specifying the nature and detail of such other expenses" in the section have not the effect contended for by the applicants. They are merely equivalent to "specifying the nature and detail of the services rendered other than conveyance on the railway." It would be very difficult, if not impossible, in the case of every rate in the company's rate-books to split up the portion of the rate charged for such services into component parts; for the amount charged is not, as a matter of business, arrived at by aggregating particular amounts charged for the different services respectively, but is charged as a lump sum to include all those services. It would enormously increase the size and complexity of the company's rate-books, if they could be compelled to give in them such particulars as are asked for in respect of every rate in their books and with regard to all their stations; which is what they are bound to do, if the construction of s. 14 contended for by the applicants is correct. It never can have been contemplated by the Legislature that the railway company should have to do this under s. 14. The applicants might obtain the information necessary for their purposes under other enactments, as for instance s. 33 of the

(1) 4 Ry. & Can. Cas. 108.

Railway and Canal Traffic Act, 1888. The question at present before the Court is not as to the applicants' right to this information as between themselves and the company; it is not a question as to that right inter partes. The question is, under s. 14, whether the railway company can be compelled to publish such information in their rate-books. It may be that the railway company must make such a dissection of a rate as is asked for, roughly, and as best they can, for the purposes of a particular question arising inter partes; but it really would not, practically speaking, be possible to make it hypothetically, with regard to a great number of rates, in the rate-book published for the information of the public. If the information required by the applicants could be obtained under s. 14 of the Regulation of Railways Act, 1873, it would not have been necessary to pass the enactments contained in s. 33 of the Railway and Canal Traffic Act, 1888.

[They cited *London and North Western Ry. Co.* v. *Lee* (1); *Pidcock & Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2)]

Foote, K.C., and *R. Whitehead* (*Balfour Browne, K.C.*, with them), for the applicants. The particulars given by the railway company give the applicants no effective information whatever. It was held by the Railway Commissioners as long ago as 1882 in *Colman* v. *Great Eastern Ry. Co.* (3), and again in *Birchgrove Steel Co.* v. *Midland Ry. Co.* (4), that, under an order made in pursuance of s. 14, the railway company must state the particular amounts charged in respect of each of the services rendered other than conveyance. The object of the section is that the applicant may be able to ascertain whether an undue preference is being given to other traders. The particulars given by the company in this case do not enable the applicants to do so. The applicants are carriers, who do their own cartage to and from stations, and they want to know whether they receive an adequate rebate in respect of cartage. Inasmuch as the particulars given do not shew what is charged in the rate for cartage, they do not assist

(1) (1891) 7 Times L. R. 603.
(2) (1895) 9 Ry. & Can. Cas. 45.
(3) 4 Ry. & Can. Cas. 108.
(4) 5 Ry. & Can. Cas. 229.

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the applicants in this respect. No such difficulties as are suggested by the company will arise from the construction of the section contended for by the applicants. The Commissioners have a discretion as to whether they will make an order under the section, and they are not bound to order the particulars required by an applicant to be inserted in the rate-books of the company if they think it unreasonable and unnecessary to do so, provided the company will give the necessary information to the applicants.

[They also cited *Tomlinson* v. *London and North Western Ry. Co.* (1); *Coxon* v. *North Eastern Ry. Co.* (2); *Berry* v. *London, Chatham and Dover Ry. Co.* (3); *Liverpool Corn Traders' Association* v. *London and North Western Ry. Co.* (4)]

Cripps, K.C., in reply.

COLLINS M.R. This is an appeal against a decision of the Railway Commissioners upon an application by traders against a railway company under the Regulation of Railways Act, 1873, s. 14, for an order requiring the company to disintegrate certain rates in their rate-book and to distinguish the amount charged for conveyance on the railway from the amount charged for other expenses, specifying not only the nature of the other charges, but also the particular amounts charged in respect of each of them.

Sect. 14 is as follows: "Every railway company and canal company shall keep at each of their stations and wharves a book or books shewing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged." Up to that point, the section states the whole of the obligation which is in general imposed upon the company in respect of the matters to be set forth in their rate-books; and it is not until some further conditions come into play that any larger

(1) (1890) 7 Ry. & Can. Cas. 22.
(2) (1883) 4 Ry. & Can. Cas. 284.
(3) (1884) 4 Ry. & Can. Cas. 310.
(4) (1890) 7 Ry. & Can. Cas. 125.

obligation is imposed upon them in respect of the contents of those books. The section then, after providing that "every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee," proceeds as follows: "The Commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses."

In this case the applicants are rival traders, who claim to be persons interested in having information as to the matters specified in the section. Being carriers, who do their own cartage to and from the railway stations, they say that, if they are being charged the same rate as traders who are not doing their own cartage, it would be an undue preference. They have made application to the Railway Commissioners, alleging that such an undue preference is being given, and claiming the remedies incidental to such a case; and they say that, under s. 14 of the Regulation of Railways Act, 1873, they ought to be informed as to the precise amount charged by the railway company in their rates in respect of cartage.

The Commissioners have made an order against the railway company under s. 14, and certain particulars were delivered by them under that order, with which the applicants are not satisfied. It was contended for the railway company, when the matter again came before the Commissioners, that, upon the true construction of s. 14, they were not bound to disintegrate their rates to a higher degree than they have done in these particulars. I will take as an example of the particulars given the first rate mentioned in them. It is as follows: "Description of Traffic: Soap. Stations from and to: Bradford; Dewsbury. Rate, including Collection and Delivery, per ton: 7*s.* 10*d.* For Conveyance: 2*s.* 10*d.* For other Expenses: 5*s.* Nature and detail of such other expenses: Provision of station

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at each end, loading and unloading, covering and uncovering, collection and delivery." The railway company, therefore, specify all the well-known matters which constitute station terminal charges and charges for collection and delivery, but do not give the particular sums charged in respect of each of such matters. They contend that they are not bound to do more.

Whether that contention is correct no doubt depends upon the true construction of s. 14 of the Regulation of Railways Act, 1873; but we are not concerned solely with that section, for the subsequent section, the 15th, appears to throw some light upon the matter. By that section it is provided that "the Commissioners shall have power to hear and determine any question or dispute which may arise with respect to the terminal charges of any railway company, where such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery, and other services of a like nature: any decision of the Commissioners under this section shall be binding on all Courts and in all legal proceedings whatsoever." The giving of that power to the Commissioners would seem to involve that it must be possible for them under the statute to ascertain what charges are in fact made as one factor in determining what are reasonable charges.

Coming to the words of s. 14 itself, I must say that at first sight it would seem probable from the terms used that what the Legislature must have had in view was the costs and charges of the various services other than conveyance included in the rate. The words are: "Distinguish in such book how much of each rate is for the conveyance of the traffic . . . . and how much is for other expenses, specifying the nature and detail of such other expenses." Apart from authority, I should have thought that the words "nature and detail of such other expenses" would primâ facie include the amount of the charge made for each particular service other than conveyance. It is suggested for the railway company that the meaning is merely that the company may be made to distinguish in their rates the amount charged for conveyance of the traffic from that

charged for other services, and to specify what other services are included in the rate; and that the words used are really equivalent to "nature and detail of such other services." This point has been the subject of decision as far back as 1882 in *Colman* v. *Great Eastern Ry. Co.* (1) It was held in that case that the words "specifying the nature and detail of such other expenses" required a railway company to state what terminal services they undertake to perform and how much they charge for each of such services, and that a company does not sufficiently comply with the section by giving a list of the various services which they perform, and stating what their total charge is for the whole of those services; which is precisely what the company have done in this case. Sir Frederick Peel said in giving judgment: "We think that the railway company have not complied with our order. The Act of Parliament assumes that a rate consists of two parts—first a part for the conveyance of the traffic; and, secondly, a part for other expenses; and, as regards the second part, it requires the nature and detail of such other expenses to be specified. The railway company have thought it sufficient in this case to give a list of the various terminal services which they perform, and to state merely what their total charge is for the whole of those various services, but not to say how much of that total charge is for each of those services. We think that is not sufficient." That decision was followed by another decision of the Commissioners to the same effect in *Birchgrove Steel Co.* v. *Midland Ry. Co.* (2) The head-note of that case is: "The details to be given under s. 14 of the Regulation of Railways Act, 1873, must be such as to enable the person paying the rates and the Commissioners, should application under s. 15 be made to them, to say whether an expense charged for in the rate is an expense for which the railway company can properly charge, and whether the amount charged for that expense is reasonable or not." Sir Frederick Peel said in giving judgment: "Under the 14th section of this Act of 1873 a trader is entitled to know from a railway company, and, if necessary, to have the information put down in the rate-

(1) 4 Ry. & Can. Cas. 108. (2) 5 Ry. & Can. Cas. 229.

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book, how much of a rate is for the movement along the line, and how much is for other expenses; and he is also entitled to know as regards these other expenses the nature and details of them. As to what the nature of an expense is, that speaks for itself. If there is an expense, for which a charge is made in the rate, which is of a distinct character, it ought to be particularized: and, as to the details of the expenses, of course details may include a great many things. But there is one detail that a trader is especially concerned in knowing, and we must remember that this 14th section was passed in the interests of the trader. He is concerned in knowing in what way an expense affects the amount of the rate; in other words, he is entitled to know what portion of a rate is attributable to the expense which the company allege is charged for in the rate." The view so taken by Sir Frederick Peel was concurred in by Mr. Commissioner Price and Mr. Commissioner Miller. That decision seems to me to be good sense, and to be in consonance with what one may gather from the words of the section and the context to have been the intention of the Legislature in the matter.

I have referred to s. 15 of the Regulation of Railways Act, 1873, as throwing light on s. 14; but I would refer to the provisions of an earlier Act and also of a later one, which indicate, I think, what has been the current of legislative intention on this subject. Sect. 17 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), appears to have been a step in the direction of giving that relief to traders which was more completely given by the further step taken in the Act of 1873. It seems to me obvious on looking at the legislation that the tendency has been gradually to enlarge the rights of the trader in these matters as against the railway companies. Sect. 17 provides that, "where any charge shall have been made by a company in respect of the conveyance of goods over their railway, on application in writing within one week after payment of the said charge made to the secretary of the company by the person by whom or on whose account the same has been paid, the company shall within fourteen days render an account to the person so applying for the same, distinguish-

ing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages, and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and other expenses"—and here came in the clause which rendered further legislation necessary—"but without particularizing the several items of which the last-mentioned portion of the charge may consist." When the language of that provision is contrasted with that of the section now under discussion, the inference appears to me to arise that the Legislature, in view of the limitation imposed upon the obligation of the company under the earlier statute, intended to enlarge the company's obligation by removing that limitation. To shew what has been the current of legislation on the subject, I would further refer to the subsequent legislation contained in the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 33 of which gives still further facilities to traders in respect of the rates charged by railway companies. Under the Regulation of Railways Act, 1873, s. 14, the trader could only obtain the advantages contemplated by the Act by application to the Railway Commissioners. In 1888 the Legislature seem to have thought it desirable to give a more summary remedy; and accordingly in s. 33 of the Act of 1888 we find certain provisions with regard to information to be given by the company in their books, and that a company failing to comply with the provisions of that section is to be liable to a penalty on summary conviction. At first I thought that this section furnished an argument in favour of the railway company; for it was not disputed that the trader could obtain the information which he might require under that section, and therefore, I thought, it might possibly be argued that it could not have been given by the earlier statute. But, on consideration, I do not think that argument is sound; for it appears to me, on reference to the terms of the section, that the scope of it is merely to afford further facilities by enabling the trader to obtain information as to the matters contemplated by s. 14 of the Act of 1873, without application to the Commissioners, and to provide by way of

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sanction that, if the company fail to comply with the provisions of the section, they shall be subject to a penalty. We therefore, as it seems to me, approach the question in this case with a clear indication given by the general scheme and current of the legislation on the subject that the view of the Legislature was that the trader ought to be in a position to obtain such information as the applicants in this case desire.

The counsel for the railway company makes in answer to the application what at first sight seems to be a very formidable point. He says that s. 14 is a provision dealing with the rate-books of railway companies; that it concerns the matters which are to be set out in such rate-books; and that it never can have been the intention of the Legislature that the company should be compellable, at the instance of any individual, to set out in their rate-books, which contain rates from and to every station on their system, the minute details of every such rate, sub-dividing the total charge for services other than conveyance into the charges made for each service performed. The answer to this argument appears to me to be that the first part of the section, which is general in its application, does not impose upon the company a general obligation to set out all these details in their rate-books. It might be very difficult to do that, for it might not be possible to arrive at them by any process of analysis of the total charge; because, as a matter of fact, that charge may not have been arrived at by minute examination of the cost of the particular services performed, but by a more rough and ready process, sometimes known as rule of thumb. It would no doubt be possible to make a dissection of the rate, and to introduce some form of rate-book shewing the amount applicable to each of the services performed other than conveyance, but it certainly would be a great burden on the company to do this as to every single rate in their rate-books. The latter portion of the section does not impose that burden upon them as a general rule. It merely deals with the case of a particular person interested in a particular kind of traffic, and provides means by which the company can be compelled to give him information as to these matters of detail. I do not see that it necessarily involves

the company's crowding their rate-books in all cases with these details and publishing to the world the alterations so made in them; but I think that for the applicants they must go through their rate-book and for their purposes distinguish how much is charged for each service performed. If they give the applicants information sufficient for their purposes, I do not know that the Commissioners are bound under the section to call upon the railway company to put that information in such a form that it may be available for the public at large. It is not necessary for us to decide that question, but the Commissioners appear to me to have a discretion under the section, which I think might be exercised in limiting the amount and form of the information to be given. It does not seem to me, therefore, that the contention for the applicants really involves the formidable consequences which have been pressed upon us in argument on behalf of the railway company.

I have given this somewhat elaborate judgment, though we are affirming the decision of the Court below, because the reasoning of Bigham J. in giving judgment was in favour of coming to a different conclusion from that at which he felt constrained to arrive in deference to an opinion which I expressed, when presiding over the Railway Commission, to the effect that the Commission ought to follow decisions previously given by it. I cannot claim the merit of having initiated any new principle in that dictum, because it is merely, as it seems to me, an application of the common rule that a tribunal ought not to overrule its own decisions. We are, however, sitting here as a Court of Appeal, and we are asked as such to overrule the decision given by the Railway Commissioners in *Colman* v. *Great Eastern Ry. Co.* (1) in 1882. It seems to me, as I have already said, that that decision was good sense, and was in accordance with the general intention apparent in the legislation on the subject. For these reasons I think that the order of the Railway Commissioners in this case was right and that this appeal should be dismissed.

MATHEW L.J. I am of the same opinion, and I have little to add. Notwithstanding the fact that Bigham J. threw the

(1) 4 Ry. & Can. Cas. 108.

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weight of his authority into the opposite scale, I must say that the reasoning of the decisions, which we should have to overrule, if his opinion were correct, is to my mind satisfactory. We are asked now to depart from the view acted on by the Railway Commissioners for many years, namely, that a trader interested is entitled under s. 14 of the Regulation of Railways Act, 1873, to have information given to him by the company with regard to the way in which their rates are made up in such a shape as will enable him to see whether the charges are unreasonable and whether an undue preference is given to other traders. The Act of 1868 permitted the company to lump together in their rate a number of charges, which may be summarized as terminal charges, and charges for collection and delivery, without particularizing the several items of which that portion of the rate might consist. Under that provision the trader could not effectively establish his right to a rebate in respect of services which were not performed by the company in his case, or the fact of an undue preference being given to a particular trader. That provision was followed by that of the Regulation of Railways Act, 1873, s. 14. It seems to me clear from the language of that section that it was intended that, on the application of a person interested, the Commissioners might order the company to afford to him the necessary information as to the particular items which under the former Act the railway company were allowed to lump together under the head of other expenses. By s. 14 the company are to distinguish how much of the rate is for conveyance and how much for other expenses, "specifying the nature and detail of such other expenses." Upon the plain meaning of that language I do not see how it is possible for the railway company to comply with the section without stating the amount charged for each of the services other than conveyance. I think that the intention of the Legislature was that the trader should be able to obtain such information readily. It is sought to nullify the provisions of the section on the ground that it would be extremely inconvenient for the company to comply with it. Our attention was called to the fact that the section provides that the information required shall be given in the rate-book; and it was urged that it would be

a very difficult thing to fix the amount attributable to each service, and that great inconvenience might be occasioned to the company if they were compelled to alter their rate-books by inserting the requisite details in them. I am not much impressed by this argument. It will not be necessary for the company to calculate the various items with greater nicety than, as a matter of business, is practicable. Nor do I see that any such inconvenience as is suggested will arise with regard to the rate-books. The Commissioners have a discretion under the section as to what they will order, and, if it is not really necessary for the purposes of the trader that these details should appear in the rate-book, they will be at liberty, as it appears to me, to say that the rate-books need not be altered, but that the necessary information must be given to the trader. Sir Frederick Peel points out that they have a discretion in the matter in the case of *Birchgrove Steel Co.* v. *Midland Ry. Co.* (1)

COZENS-HARDY L.J. I agree, and also have very little to add. The stress of the argument of the counsel for the railway company was laid upon the suggestion that the view taken by the Commissioners would impose an intolerable and even impossible burden on the company; and they treated the application as one which assumed that, prior to the order of the Commissioners, the railway company had been keeping their rate-books in a wrong form. I do not so read s. 14 of the Regulation of Railways Act, 1873. It appears to me that the section does not impose on the company a general obligation, as between themselves and the public at large, to state all the details mentioned in the latter part of the section in their rate-books. The Attorney-General could not, in my opinion, intervene and take proceedings against the company on the ground that they had failed in performing their duty towards the public by not inserting in their rate-books all these details with regard to the rates between all their different stations. The Act does not, I think, provide that they shall do so. The first part of s. 14 is general; but the latter part of it deals,

(1) 5 Ry. & Can. Cas. 229.

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in my opinion, with a matter substantially different; it appears to me to impose a larger obligation on the company in favour of a particular trader interested, who under its provisions may apply to the Commissioners for what may be described as discovery of certain details, in the knowledge of which he is interested, and of which he has otherwise no means of obtaining discovery. The Commissioners have a discretion in the matter. It seems very early to have been held by the Commissioners that they were not bound to order the requisite details to be given in the rate-book, but that the trader was entitled to have them, and that, if it was necessary, the Commissioners would order them to be inserted in the rate-book. It is not for us to say how in any particular case they ought to exercise their discretion; but I think they may, if they think fit, refuse to order the insertion of the information required in the rate-books, if the company agree to furnish the applicants with the information in some other manner. Bearing in mind s. 33 of the Railway and Canal Traffic Act, 1888, I think the Commissioners may say in some cases that, if the company furnish the requisite particulars, they need not insert them in the rate-book. But I think there may be cases in which, not one trader, but a class of traders being interested, the Commissioners may be of opinion that the charges for certain services should be particularized in the rate-book. That, however, is not a matter for us, but for the Commissioners. I agree with what has been said by the Master of the Rolls and Mathew L.J. as to the language of the last part of s. 14, and I think that the interpretation given to it by Sir Frederick Peel in the cases of *Colman* v. *Great Eastern Ry. Co.* (1) and *Birchgrove Steel Co.* v. *Midland Ry. Co.* (2) was right, and ought not to be departed from by us.

Appeal dismissed.

Solicitors for applicants: *Neish, Howell & Haldane.*
Solicitor for respondents: *C. de J. Andrewes.*

(1) 4 Ry. & Can. Cas. 108. (2) 5 Ry. & Can. Cas. 229.

E. L.

[IN THE COURT OF APPEAL.]

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1905
Feb. 13, 14, 15, 16.

MAGUIRE *v.* CORPORATION OF LIVERPOOL.

Local Government — Highway — Repairs — Neglect of Duty — Damages — Misfeasance — Non-feasance — Corporation liable to Indictment for Non-repair of Highway — Liability to Action for Accident caused by Non-repair.

By 9 & 10 Vict. c. cxxvii. the defendant corporation were declared to be the surveyors of highways for the borough of Liverpool; the control of the streets was vested in them; and they were empowered to form or pave streets with such materials as they should think fit. By s. 58 it was enacted that the corporation should be liable to be indicted at common law for the want of sufficient repair of any highway in the borough in the same manner as any person or persons liable to the repair of such highways was or were before the passing of the Act. An action was brought against the corporation for injuries caused to the plaintiff's horse by the negligence of the defendants, in that they had not properly repaired a road. The want of repair was admitted, but there was no evidence of misfeasance on the part of the defendants:—

Held, that the mere fact that a new body was created with the duty to repair roads did not of itself impose on the new body a liability to actions for damages caused by non-repair of roads; and that if and so far as *Hartnall* v. *Ryde Commissioners*, (1863) 4 B. & S. 361, laid down a rule to the contrary, it must be taken to have been overruled. No fresh liability was created when the duty to repair was transferred by the Act of 1846; and the action could not be maintained. Under the modern authorities a transfer to a public corporation of the obligation to repair roads does not of itself render the corporation liable to an action for damages for non-feasance as distinguished from misfeasance; and the question whether such a liability is imposed upon them must be determined by the language of the particular Act of Parliament.

APPEAL from a decision of the judge of the Court of Passage, Liverpool.

This was an action for damages for injuries caused to the plaintiff's horse by reason of the negligence of the corporation; and the question in dispute was whether the defendants, under their special Act of 1846, were liable for non-feasance, in that they had not repaired a road, as distinguished from misfeasance.

The facts were stated by the learned judge of the Court of Passage as follows: The plaintiff's horse and trap were, on

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November 5, 1903, being driven down Brownlow Hill, a public highway in the city of Liverpool. At a point in Brownlow Hill where it is entered by Blake Street there is a crossing made by slabs of stone placed in the roadway. On the lower side of the crossing near one of the slabs of stone a hole had been formed, described as being five inches in depth and shelving up to three inches, and nine inches across. Into this hole the plaintiff's horse put its foot, fell on its knee, and received such injuries that it had to be destroyed, with consequent agreed loss to the plaintiff of 24*l*. The driver of the trap and a man who saw the accident were the only witnesses called for the plaintiff. They said that the hole was caused by rain-water descending the hill and by the traffic, and they described the material near the hole as loose shingle. They said that similar holes existed at the crossings in Brownlow Hill. It was not contended by the defendants that the driver had been careless. Counsel for the defendants admitted the want of repair.

The learned judge held that there was no evidence of misfeasance on the part of the corporation. The jury were discharged, and the question under the private Act of 1846 was then argued. The judge considered that he was bound by *Hartnall* v. *Ryde Commissioners* (1); decided that an action for damages would lie against the corporation; and gave judgment for the plaintiff for 24*l*. and costs.

The corporation appealed.

By an Act of Parliament of 1830 for the better paving, &c., of the town of Liverpool (11 Geo. 4, c. xv.), which recited that the liability to repair the roads rested partly on the corporation and partly on the inhabitants, commissioners were appointed for putting the Act into execution, and were, by s. 75, invested with the powers of surveyors of highways. All the pavements in the streets were vested in them, with power to repair them: s. 21. By s. 76 the corporation were to give up paving the ancient streets hitherto repaired by them, and were to pay 5000*l*. a year to the commissioners to be applied by them for the purposes of the Act. Such of the highways as had hitherto

(1) 4 B. & S. 361.

been repaired by the corporation were in future to be repaired by the commissioners.

In 1846 an Act was passed (9 & 10 Vict. c. cxxvii.) for the improvement of the sewerage, &c., of Liverpool. The preamble recited that various Acts of Parliament with reference to Liverpool had been passed; that the borough now included other townships, and had become extremely populous, and no express provision had been made (inter alia) for paving and cleansing the streets, and that it was expedient that the powers to be granted for the said purposes should be combined under one management, and should be uniform throughout the whole of the said borough. By s. 6 the Act of 1830, so far as it related to this question, was repealed. By s. 10 the property of the commissioners was vested in the mayor, aldermen, and burgesses of the borough. Other material sections were as follows:—

"XXXVI. The mayor, aldermen, and burgesses shall be and they are hereby declared to be the surveyors of highways within and throughout the said borough, and shall have and they are hereby invested with, and by the said council may exercise, all such powers and authorities as any surveyors of highways in that part of the United Kingdom called England are or shall be invested with by virtue of the laws now or hereafter to be in force, and shall also be subject to all the liabilities to which surveyors of highways are now by law subject or may hereafter become subject.

"XXXVII. The management and control over all and every of the streets within the said borough existing and being at the time when the provisions of this Act shall come into operation, or which shall thereafter be made (not being turnpike roads), and the pavements and other materials as well in the footways as carriageways of the said streets, and all erections and buildings, materials, implements, and other things, provided for the purposes of the said highways by the surveyors of the highways, or by the said commissioners, under the hereinbefore recited Acts respectively, or by the said mayor, aldermen, and burgesses, or the said council, shall be the property of and are hereby vested in the said mayor, aldermen, and burgesses.

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"XXXVIII. It shall be lawful for the said council from time to time to cause all or any of the streets within the said borough so vested in the mayor, aldermen, and burgesses as aforesaid, or any part thereof, to be formed, paved, or flagged, and the ground or soil thereof to be raised, lowered, or altered in such manner and with such materials as they shall think proper, and also to pave or make, with such materials as they shall think fit, any causeways, pavements, or footways for the use of passengers in or on the sides of any such street, or elsewhere within the said borough, and to cause such streets, causeways, and footways to be repaired from time to time as may be required: Provided always, that if in consequence of carrying the said power and authority into execution any alterations of any steps, doors, or entrances into any houses or buildings, or of any pavement, sewer, or drain adjoining or belonging to any property, shall be rendered necessary, such alteration shall be made by the said council by and out of the rates to be raised by virtue of this Act."

"LVIII. The said mayor, aldermen, and burgesses shall be liable to be indicted at common law for the want of the sufficient repair of any public highway within the said borough in the same manner as any person or persons liable to the repair of such highways was or were before the passing of this Act."

By s. 59 persons assessed to the paving rate were to be free from highway rates.

Sect. 160 provided that for rating purposes the various districts should remain separate.

By s. 161 the corporation were to pay the 5000*l.* a year, payable under the Act of 1830, in aid of the sewerage and paving rates of the parish of Liverpool.

Pickford, K.C., and *Oulton*, for the defendants. The learned judge based his decision upon *Hartnall* v. *Ryde Commissioners* (1), a decision which, if it can be regarded as good law, was no doubt binding upon him. But that decision,

(1) 4 B. & S. 361.

if it has not been actually overruled, has been in recent cases, including one in the House of Lords, disapproved. It was long ago established that the inhabitants of a parish were not liable to an action for the mere non-repair of a highway, though they would be liable for such an act as placing an obstruction upon the highway. The surveyor of highways, who was the servant of the inhabitants, could not be indicted, nor could an action be brought against him for non-repair of a highway: *Young* v. *Davis*. (1) Under the Public Health Acts, 1848 and 1875, it has frequently been held that sanitary authorities are not liable to actions for mere non-feasance, though they are liable for acts of misfeasance.

The provisions of the Liverpool Act of 1846 are very similar to those of the Public Health Acts; but there is in addition s. 58, which provides a remedy for non-repair of a highway by means of indictment, and the proper inference is that that is the only remedy, and that an action will not lie.

In *Municipal Council of Sydney* v. *Bourke* (2) Lord Herschell L.C. said: "In the series of cases ending with *Cowley* v. *Newmarket Local Board* (3), in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to shew that the Legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability."

Before the Liverpool Act of 1830 some of the roads in the borough were repairable by the parish, and others were

(1) (1862) 7 H. & N. 760; (1863) 2 H. & C. 197.

(2) [1895] A. C. 433, at p. 443.

(3) [1892] A. C. 345.

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repairable by the corporation, and the Act of 1830 transferred the duty of repairing all the roads to the commissioners appointed by that Act. That Act was repealed by the Act of 1846, which transferred to the corporation the duty of repairing all the roads: ss. 36, 37, 38. Sect. 36 placed the corporation in the position of a surveyor of highways. The Act of 1830, by s. 76, provided that the corporation should be released from all liability to the repairing of the highways. The Act of 1846 repealed the Act of 1830, but it contained no similar provision. The Towns Improvement Act (10 & 11 Vict. c. 34) contains provisions (ss. 48, 49) similar to those contained in the Liverpool Act of 1846.

In *Ohrby* v. *Ryde Commissioners* (1) *Hartnall* v. *Ryde Commissioners* (2) was followed.

In *Couch* v. *Steel* (3) it was held that a shipowner on whom the duty was imposed by statute of keeping on board his ship a proper supply of medicines was liable to an action by a seaman who had been injured by a breach of that duty, though the statute imposed a penalty for the breach. In *Gibson* v. *Preston Corporation* (4), a case under the Public Health Act, 1848, it was held that a local board of health, in whom the highways were vested by that Act, were not liable to an action for the non-repair of a highway. In that case *Hartnall* v. *Ryde Commissioners* (2) was distinguished, as it was also in *Parsons* v. *Vestry of St. Matthew, Bethnal Green* (5), a case under the Metropolis Local Management Act, 1855. *Hartnall* v. *Ryde Commissioners* (2) was distinguished, and, it may be said, disapproved, in *Cowley* v. *Newmarket Local Board.* (6) In that case Lord Halsbury L.C. said: "whether that case is quite consistent with the principles upon which cases of the class now before your Lordships have been decided or not it is immaterial to discuss. The language of the statute was different, and the ground of the decision was that a new and peculiar right had been created. No such question to my mind arises here. With the exception to which I have last

(1) (1864) 5 B. & S. 743.
(2) 4 B. & S. 361.
(3) (1854) 3 E. & B. 402.
(4) (1870) L. R. 5 Q. B. 218.
(5) (1867) L. R. 3 C. P. 56.
(6) [1892] A. C. 345, at p. 350.

alluded, the principle has been maintained for certainly more than a century, and I am of opinion that in this case no ground has been put forward on which the long current of authorities should be disturbed."

Hartnall v. *Ryde Commissioners* (1) was disapproved also in *Municipality of Pictou* v. *Geldert*. (2) And in *Atkinson* v. *Newcastle, &c., Waterworks Co.* (3) Lord Cairns disapproved the general principle laid down in *Couch* v. *Steel* (4), "that, wherever a statutory duty is created, any person, who can shew that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed."

In *Municipal Council of Sydney* v. *Bourke* (5) the Court disapproved the principle that "whenever persons can be proceeded against by way of indictment for non-repair an action will lie at the suit of any one sustaining special damage."

In *Saunders* v. *Holborn District Board of Works* (6) it was held that there was no right of action by a person suffering special damage by reason of a breach by the defendants of the duty of removing street refuse which was imposed on them by s. 29 of the Public Health (London) Act, 1891, and in that case, again, *Hartnall* v. *Ryde Commissioners* (1) was referred to with disapproval.

It is submitted that in every recent case in which *Hartnall* v. *Ryde Commissioners* (1) has been cited it has been disapproved by the Court. The true principle is that which was then laid down by Mathew J. in *Saunders* v. *Holborn District Board of Works* (7): "In order to establish that a public body is liable to an action for default in performing a duty imposed by statute, it must be shewn that the Legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the Legislature is clearly disclosed no action will lie."

[ROMER L.J. At the time when the commissioners were

(1) 4 B. & S. 361.
(2) [1893] A. C. 524, 525.
(3) (1877) 2 Ex. D. 441.
(4) 3 E. & B. 402.
(5) [1895] A. C. 442.
(6) [1895] 1 Q. B. 64.
(7) [1895] 1 Q. B. at p. 68.

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appointed the liability to repair some of the streets was upon the corporation: could not an action have been maintained against them for the non-repair of those streets?]

It is submitted that it could not; they were not liable ratione tenuræ.

[ROMER L.J. For this purpose is not a liability by prescription equivalent to a liability ratione tenuræ?]

It is submitted that it is not.

[ROMER L.J. If the commissioners were liable, the corporation would also be liable. But was it intended to keep alive the distinction between the two classes of streets? Was it not rather intended to create a new liability as to all the streets?]

It is submitted that the proper inference from the Act of 1846 is that it was not intended to create any new liability, but only to transfer the existing liability. And even in the case of a liability ratione tenuræ the remedy was by indictment.

Danckwerts, K.C., and *E. Stewart Brown*, for the plaintiff. Many of the cases which have been cited, such as *Gibson* v. *Preston Corporation* (1), *Parsons* v. *Vestry of St. Matthew, Bethnal Green* (2), and *Cowley* v. *Newmarket Local Board* (3), arose either under one of the Public Health Acts or under similar Acts relating to the metropolis. In those cases there was imposed on the local authority the liability of a surveyor of highways: see s. 144 of the Public Health Act, 1875. The cases all turn upon what was laid down in *Young* v. *Davis*. (4) There Willes J., in delivering the judgment of the Exchequer Chamber, said (5): "This Act of Parliament (i.e., 5 & 6 Vict. c. 50), so considered, appears not to have been passed for the purpose of creating a new liability, either in the parish or any other persons, but simply in order to provide machinery whereby the existing duty of the parish to repair may be conveniently fulfilled." That applies to the present case. The surveyor of highways has no duty to the public; his duty is to his employers. This observation also disposes of the cases in the Privy Council. The legal principle which applies was

(1) L. R. 5 Q. B. 218.
(2) L. R. 3 C. P. 56.
(3) [1892] A. C. 345.
(4) 7 H. & N. 760; 2 H. & C. 197.
(5) 2 H. & C. at p. 198.

laid down in the House of Lords in *Henley* v. *Mayor of Lyme*. (1) That was an action against a corporation for not repairing a sea-wall, by reason of which the plaintiff had sustained damage, and it was held that the action would lie. The judges who advised the House said (2): "In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and, lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the King's subjects by such want of repair." All those requisites are to be found in this present case.

Hartnall v. *Ryde Corporation* (3) has been expressly approved in several cases. In *Mayor of Lynn* v. *Turner* (4) the corporation were bound by prescription to repair a creek, and it was held that an action by an individual, who had been damaged by the non-repairing, would lie. It may be said that in *Young* v. *Davis* (5) *Henley* v. *Mayor of Lyme* (1) was distinguished. But in *McKinnon* v. *Penson* (6), a case very similar to *Young* v. *Davis* (5), in which it was held that an action would not lie against the county surveyor for a personal and peculiar damage resulting from the want of repair of a county bridge, Pollock C.B. said (7): "There is no doubt of the truth of the general rule, that, where an indictment can be maintained against an individual or a corporation, for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual." And the learned judge went on to say that the only reason why it was held in *Russell* v. *Men of Devon* (8) that an action would not lie against the inhabitants of a county, for

(1) (1828) 5 Bing. 91, 107; (1832) 8 B. & Ad. 77, 92; (1834) 8 Bli. (N.S.) 690, 707; 2 Cl. & F. 331; 37 R. R. 125.

(2) 2 Cl. & F. at p. 348.

(3) 4 B. & S. 361.

(4) (1774) 1 Cowp. 86.

(5) 7 H. & N. 760; 2 H. & C. 197.

(6) (1853) 8 Ex. 319; (1854) 9 Ex. 609.

(7) 8 Ex. at p. 327.

(8) (1788) 2 T. R. 667; 1 R. R. 585.

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special damage sustained by the plaintiff by reason of the non-repair of a county bridge, was that the inhabitants were not a corporation and could not be sued.

In *Russell* v. *Men of Devon* (1) reference is made to a passage in Brooke's Abridgment, tit. "Action sur le case," pl. 93, where it is said that if a highway be out of repair, by which my horse is mired, no action lies "car est populus et serra reforme par presentment." It appears from the Year Book, 5 Edw. 4 (ed. 1679), p. 2, pl. 24, that this is a misquotation. The words should be "mes ceo est action populer."

[VAUGHAN WILLIAMS L.J. referred to the Year Book, 34 Edw. 3, p. 8.]

See also *Sutton* v. *Johnstone*. (2) In Clerk and Lindsell on Torts, 3rd ed. pp. 31, 32, the question is fully discussed, and it is said that in the time of Edward IV. the reason why the action would not lie "was to be found in the necessity of avoiding a multiplicity of actions." This reason does not apply to an action against an individual or against a corporation. In *Guardians of Holborn Union* v. *Vestry of St. Leonard, Shoreditch* (3), it was held that an action could be maintained against the defendants, who, by the Metropolis Local Management Act, 1855, were constituted a body corporate, for damages for the non-removal of refuse. That decision was based on the principle that a person for whose benefit a statute was intended, and who has suffered special damage by a breach of its provisions, has a right of action against those who have caused the damage. And it was pointed out by the Court that, the defendants being a corporate body, "there is no ground for applying the reason in pursuance of which a fluctuating body like parishioners cannot be sued." In *Nitro-Phosphate, &c., Co.* v. *London and St. Katharine's Docks Co.* (4) the same principle was applied, and it was recognised in *Gorris* v. *Scott*. (5) It is for the benefit of all England that roads should exist; but there is a special benefit to those who use or intend to use the roads. This principle is illustrated by a number of

(1) 2 T. R. at p. 669.
(2) (1786) 1 T. R. 493, 784; 1 Bro. P. C. 76; 1 R. R. 257.
(3) (1876) 2 Q. B. D. 145.
(4) (1877) 9 Ch. D. 502.
(5) (1874) L. R. 9 Ex. 125.

cases which are cited in Maxwell on Statutes, 3rd ed. pp. 567 et seq. In the American case, *Weightman* v. *Corporation of Washington* (1), it was said by the Supreme Court that the cases which had been decided contrary to the principle laid down in *Henley* v. *Mayor of Lyme* (2) were "based upon a misapplication of what was decided in *Russell* v. *Men of Devon*." (3) In *Mersey Dock Trustees* v. *Gibbs* (4) Lord Blackburn, in giving the opinion of the judges, said: "In our opinion the proper rule of construction of such statutes is that, in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things." *Ohrby* v. *Ryde Commissioners* (5) explains the ground of the decision in *Hartnall* v. *Ryde Commissioners* (6), and shews that it depended on the construction of a particular Act. In *Parsons* v. *Vestry of St. Matthew, Bethnal Green* (7) the vestry were simply placed in the position of a surveyor of highways. In *Wilson* v. *Halifax Corporation* (8) the decision was merely that no obligation was imposed upon the corporation to fence the place which had been left unfenced; and a similar observation applies to *Forbes* v. *Lee Conservancy Board*. (9) In *Glossop* v. *Heston, &c., Local Board* (10), *Hartnall* v. *Ryde Commissioners* (6) was discussed, and Brett L.J. said (11) that that was an exceptional case, and that Lord Blackburn put it upon the statute, which "not only imposed on the commissioners the duty to keep the highway in repair, but contained an express enactment that if they did not they should be liable to an indictment." And Brett L.J. added that Lord Blackburn applied "the well-known common law rule that if people do that which, as

(1) (1861) 1 Black, Supreme Court of U. S. 39.

(2) 5 Bing. 91, 107; 3 B. & Ad. 77, 92; 8 Bli. (N.S.) 690, 707; 2 Cl. & F. 331; 37 R. R. 125.

(3) 2 T. R. 667; 1 R. R. 585.

(4) (1866) L. R. 1 H. L. 93, at p. 110.

(5) 5 B. & S. 743.

(6) 4 B. & S. 361.

(7) L. R. 3 C. P. 56.

(8) (1868) L. R. 3 Ex. 114.

(9) (1879) 4 Ex. D. 116.

(10) (1879) 12 Ch. D. 102.

(11) 12 Ch. D. at p. 121.

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against the public, amounts to misdemeanour, and lays them open to an indictment, and if, besides the injury to the public, they so do it as to do an injury to a private individual, that individual may maintain an action for damages for the breach of the statutory enactment which lays them open to an indictment." In *Cowley* v. *Newmarket Local Board* (1) the local board had merely the duties and liabilities of a surveyor of highways, and therefore that case is not in point here, for s. 58 of the Act of 1846 goes further; and s. 59 exempts persons who are assessed to the paving rate under the Act from liability to repair the highways. A surveyor of highways had no property in the roads such as this corporation have by s. 37 of the Act of 1846. In *Reg.* v. *Poole Corporation* (2) the decision was founded on the fact that there was nothing in s. 144 of the Public Health Act, 1875, to make the urban sanitary authorities liable to a common law indictment for neglecting those duties which have been imposed upon them either as surveyors of the highways or as inhabitants in vestry assembled. In *Borough of Bathurst* v. *Macpherson* (3) it was said that the decision in *Hartnall* v. *Ryde Commissioners* (4) had been recognised as sound law, and it was followed. That there can be a common law liability by prescription to repair highways is shewn by *Rex* v. *Mayor of Liverpool.* (5)

Sect. 58 of the Act of 1846 imposes a fresh liability on the corporation. It does not confine the remedy against the defendants to that by indictment. The liability imposed on them includes all cases in which anybody was liable for non-repair of highways, no matter how their liability originated. For instance, they might have been liable ratione tenuræ or by prescription: Archbold's Criminal Pleading, 22nd ed. pp. 1144 et seq. The object was to put on the defendants not a transferred liability, but a new and original liability beyond the liability as surveyors imposed on them by s. 36.

Under ss. 94 and 95 of the Highways Act, 1835, the justices could convict the party charged with non-repair of a road or

(1) [1892] A. C. 345.
(2) (1887) 19 Q. B. D. 602, 609.
(3) (1879) 4 App. Cas. 256, 269.
(4) 4 B. & S. 361.
(5) (1802) 3 East, 86; 6 R. R. 546.

could direct an indictment: Pratt's Law of Highways, 13th ed. p. 319. The parish was liable with but few exceptions: Pratt's Law of Highways, 13th ed. p. 72. A surveyor is looked upon as the servant of the parish, and cannot be sued; but the defendant corporation is both master and servant. The powers and duties of a corporation are the same as those of an individual: *Mersey Dock Trustees* v. *Gibbs*. (1) The only reason why the inhabitants could not be sued was that they were an indeterminate body. That does not apply to a corporation, and there is nothing to shew that the Legislature intended to leave the liability as it was.

There is evidence in this case of misfeasance. The defendants caused the hole which produced the accident by making the crossing of improper materials: *Borough of Bathurst* v. *Macpherson* (2); *Municipal Council of Sydney* v. *Bourke* (3); *Shoreditch Borough Council* v. *Bull*. (4)

Pickford, K.C., in reply. There is nothing to shew that the accident was due to any act done by the defendants. The crossing was constructed under s. 38 of the Act of 1846, and the materials employed were usual and proper. The plaintiff has no cause of action. The duties imposed upon the corporation by s. 58 are similar to those cast upon urban authorities by the Public Health Act, 1875, ss. 144, 145, 149. The fact that the streets are vested in the corporation is not enough to make them liable to an action. That was the case in *Cowley* v. *Newmarket Local Board* (5), which was under the Act of 1875. There is no right of action against the defendants apart from s. 58, and that is covered by *Cowley* v. *Newmarket Local Board*. (5) In *Mersey Dock Trustees* v. *Gibbs* (1) the plaintiffs were ordinary traders, not a public body.

VAUGHAN WILLIAMS L.J. This is an appeal from a decision of the judge of the Passage Court, and it is obvious from his judgment that the learned judge would have arrived at a different conclusion if he had not felt himself bound by the

(1) L. R. 1 H. L. 93.
(2) 4 App. Cas. 256.
(3) [1895] A. C. 433.
(4) (1904) 2 L. G. R. 756.
(5) [1892] A. C. 345.

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decision of the Queen's Bench in the case of *Hartnall* v. *Ryde Commissioners*. (1)

Now it is said that *Hartnall* v. *Ryde Commissioners* (1), if it has not been overruled, has at all events been commented upon in the House of Lords, and particularly by Lord Herschell, in such a way as to cast grave doubt upon its authority. I do not think myself that we need go the length of saying that it has been overruled. It is a decision that is based upon a particular Act of Parliament, and it may be doubted whether the Court of Queen's Bench in that case intended to lay down a general principle which should apply universally in the case of a liability to repair highways being imposed by an Act of Parliament. If the Court of Queen's Bench did mean to lay down such a general principle, it would seem to be inconsistent with the subsequent decision of the House of Lords in the case of *Cowley* v. *Newmarket Local Board*. (2) That was a case which turned upon the liability of a local board established by the Public Health Act, 1875, in respect of non-repair of a highway. The result was in that case that the House of Lords, affirming the decision of the Court of Appeal, held that no action would lie in such a case against a local board created under the statute of 1875. But it is difficult to see how the House of Lords could have come to that conclusion consistently with the case of *Hartnall* v. *Ryde Commissioners* (1), if it really did lay down the principle which it has been suggested that it did lay down in respect to highways generally. I think that we, having regard to the decision in *Cowley* v. *Newmarket Local Board* (2), may, at all events, act upon the assumption that *Hartnall* v. *Ryde Commissioners* (1) is not good law, if it is right to assume that it did lay down a general proposition in regard to the liability in respect of repair of highways in cases of non-feasance.

I take it that our duty in this case is to look at the Act of Parliament of 1846, and consider what is the liability of the corporation of Liverpool in respect of actions brought against them for damages for injuries sustained by reason of the highway being out of repair. Now I think it is right to say

(1) 4 B. & S. 361. (2) [1892] A. C. 345.

here that, notwithstanding the observations that Mr. Danckwerts addressed to us at the conclusion of his argument, I am clearly of opinion that there is no evidence whatsoever which the Court ought to consider, or which ought to have been left to the jury, of any act of misfeasance on the part of the corporation. Mr. Danckwerts called our attention to a case of *Shoreditch Borough Council* v. *Bull* (1), and suggested that there was something in that case to lead us to say that there is evidence here of an act of misfeasance by the defendants causing the accident, the subject of the action. I do not find anything in that decision compelling us to come, or which ought to induce us to come, to any such conclusion at all. It is quite true, and nobody will dispute it, that there may be cases in which an act of misfeasance by the body liable to repair has thrown the road into a condition which amounts to a nuisance, and would make it dangerous for the public to use it. If by an act of misfeasance a road has been reduced to such a condition, it is not possible then for the defendants to say, "Oh, what you are really complaining of here is non-feasance in not putting the road right; not an act of misfeasance in putting the road wrong." Of course they cannot do that. The plaintiffs in *Shoreditch Borough Council* v. *Bull* (1) did shew that acts of misfeasance on the part of those who had the obligation to repair had reduced the road to a condition which made it unfit to use. It was held that they could not then say that the fact that they had omitted to remedy the wrong they had done entitled them to treat the action as an action for non-feasance as distinguished from an action for misfeasance.

I now proceed to deal with the only question which really is left for us to deal with. We have to consider what was the intention of this Act of Parliament. I do not propose to say very much about the previous history of the obligations to repair in the borough of Liverpool, although Mr. Danckwerts did dwell considerably upon their history. Shortly, it may be said that there was a time prior to 1830 during which the streets in the town of Liverpool were partly repairable by the inhabitants of the parishes in that town, although there were

(1) 2 L. G. R. 756.

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other streets which were repairable by the corporation of the borough; that liability being really a prescriptive liability. The fact that boroughs frequently do incur a liability by prescription to repair certain streets within the limits of the borough is undoubted; I see that the fact is mentioned in Coke's Institutes, Part II. at p. 700, and that was the state of things in Liverpool. Then came the legislation under the Act of 1830, followed by the legislation under the Act of 1846. Some suggestions were made that under the Act of 1830 liabilities were really definitely imposed upon the commissioners. Another suggestion was that, according to the true construction of the Act, that was not so. But I do not think we need take that into consideration here. We have to construe the Act of 1846, and the first thing that we find that this Act of Parliament deals with is liability to repair, which by the common law, independently of other special legislation or the existence of some liability ratione tenuræ or by prescription, would be thrown upon the inhabitants at large. And it is that liability which is dealt with in this Act of Parliament, and which is put upon the corporation.

We have to say whether the liability which is thus put upon the corporation ought, according to the true construction of this Act of Parliament, to be held to be of the same nature as the liability of the inhabitants to repair by the common law; or whether it ought to be treated as a different liability, and a larger liability. To come down to the particular question that we have to deal with, one has to ask oneself whether the liability imposed upon the corporation by the Act of 1846 is a liability which, so far as non-feasance is concerned, can only be enforced by the Crown by indictment, not by the subject by action at all; or are we to treat the liability which is imposed upon the corporation as a liability coming within the rule, where statutory duties are laid upon public bodies by statute, that in the case of any one suffering damage by reason of the neglect of such public body to perform the duties which are thrown upon it by the statute, an action will lie by the individual member of the public who sustains particular injury by reason of that neglect of duty. We have to decide within

which of those two rules, according to the true construction of this Act of Parliament, the corporation must be held to come.

In my opinion, the corporation under this Act of Parliament come within the former proposition, and not the latter. I think that, according to the true construction of this Act of Parliament, there has been transferred to the corporation the same duty of repair and the same liability as, ordinarily speaking, is incurred by the inhabitants of a parish in respect of the maintenance of roads. I do not think that we ought to construe this Act of Parliament so as to hold that there is a statutory duty thrown upon the corporation which renders them liable to an action at the suit of a subject who has sustained injury by the particular neglect of the corporation to perform the duty of repair which is cast upon them by the Act.

But it is necessary to refer a little at length to the provisions of the Act. The 1st section sets forth that it is desirable for the construction and maintenance of drains and sewers and for the paving and flagging of the streets that the power to be granted for such purposes should be combined under one management, and should be uniform throughout the whole of the borough. Having said that, I pass at once to s. 36, which throws on the mayor, aldermen, and burgesses the duties of surveyors of the highways—a section which, it is worth while to notice, is almost identical with s. 144 of the Public Health Act, 1875, in respect of which the decision in the case of *Cowley* v. *Newmarket Local Board* (1) was given. No one has argued that s. 36 taken alone would impose upon the defendants the liability to be sued in such an action as the present. Then comes s. 37, which gives to the corporation the control of the streets vested in them. It is said that the effect of that section and s. 38, which deals with the paving of streets and other matters, is to impose upon the corporation a primary duty to repair, and that they are not entitled to the benefit of the undoubted doctrine of law which has been established in respect to inhabitants of parishes when the liability to repair is thrown upon them. To this again the answer is to be found

(1) [1892] A. C. 345.

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in *Cowley* v. *Newmarket Local Board.* (1) If one looks at the later sections of the Public Health Act, 1875, and in particular at s. 149, one finds there again the vesting of the streets in the urban authority, and also the provision as to the control of such streets. There is really, in substance, no difference between the effect of s. 149 of the Public Health Act, 1875, and the provisions in ss. 37 and 38 of the Act of 1846. In the case of *Cowley* v. *Newmarket Local Board* (1) the decision of the House of Lords, and also of the Court of Appeal, was that, notwithstanding the provisions with regard to the vesting of the streets and the control of the streets, to which I have called attention, yet the case fell exactly within the same limits of liability as had always existed by the common law in cases where the obligation to repair was on the inhabitants at large. Therefore, as far as that is concerned, the conditions thus far of the provisions of the Act of 1846 seem to necessitate the same conclusion as to the meaning of that statute as the House of Lords arrived at in construing the Public Health Act of 1875.

Now I should like before dealing with the 58th section of the Act of 1846 to say a word or two upon what was the ground of the decision in *Cowley* v. *Newmarket Local Board.* (1) I observe that both Lord Halsbury L.C. and Lord Herschell assume that under the Public Health Act of 1875 a primary obligation to repair was imposed by the Public Health Act upon the urban authority, and they assume that notwithstanding the fact that in s. 144 that which is said to be imposed upon the local board are the offices and duties of a surveyor of highways just as it is under this Act of 1846. But it is assumed, and I assume with reference to this Act of 1846, that the primary duty to repair is by the Act of 1846 thrown upon the corporation of Liverpool. That statutory obligation having been created, how is it that by the decision in *Cowley* v. *Newmarket Local Board* (1) escape is made from the general proposition that where a statutory duty is created of such a nature that indictment would lie, or a remedy by criminal law be good for neglect to perform the statutory duty, an action

(1) [1892] A. C. 345.

will lie at the suit of a subject sustaining particular injury—I say, how is it that that undoubted general principle is escaped from in the decision in *Cowley* v. *Newmarket Local Board*? (1) According to my understanding of the judgments, both of Lord Halsbury and Lord Herschell, it is really escaped from by going back to what is the liability which is thrown upon the inhabitants of the parish in respect of liability to repair roads, and the limitation of procedure for neglect to perform that duty to procedure by the Crown. I arrive at the conclusion that this Act of 1846 was really mainly passed for purposes of convenience of remedy, and convenience of performing the duties in respect of a large aggregate of houses and streets such as one finds in the case of the town of Liverpool. The object of the legislation merely being that sort of convenience, the object of the Act is that and that alone. It was not intended to alter the liability of those upon whom for convenience the carrying out of this work was thrown, but to leave it exactly as it was in cases where the obligation to repair was thrown upon the inhabitants of the parish. If one looks at the judgment of Lord Herschell on p. 353 one finds this passage: "In *Young* v. *Davis* (2) it was held in the Exchequer Chamber that a surveyor of highways was not liable to an action for injuries resulting from the breach of his duty to keep the highways in repair. It was argued in *Gibson* v. *Mayor of Preston* (3) that the Public Health Act, 1848, did something more than impose upon the corporation the duties and subject them to the liabilities of surveyors of highways, and that under the provisions of that statute they were liable to a person suffering through the non-repair of a highway. The Queen's Bench, however, in a considered judgment, rejected this argument, and held that the defendants were not liable. The provisions of the Public Health Act, 1875, on which the appellant now relies, are precisely similar to those upon which the judgment in *Gibson* v. *Mayor of Preston* (3) proceeded. Your Lordships are asked to overrule that decision. I am not prepared to do so. The Legislature in 1875 re-enacted

(1) [1892] A. C. 345. (2) 2 H. & C. 197.
(3) L. R. 5 Q. B. 218.

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unaltered the provisions upon which this construction had been placed, and I cannot think that it was intended by the Legislature to impose the liability now contended for. The only case which can be relied upon as affording any support to the appellants' contention is *Hartnall* v. *Ryde Commissioners*. (1) But the legislation on which that case turned was not precisely the same, and the arguments which were so carefully considered, and which prevailed in *Gibson* v. *Mayor of Preston* (2), do not appear to have been insisted upon. For it appears to be assumed in the judgment that if the defendants were liable to be indicted for the non-repair of the highway as for a misdemeanour an action would lie by any one specially aggrieved. No reasons are given for this conclusion, which seems to have been treated as a necessary consequence. I think the judgment appealed from ought to be affirmed."

Now the judgment of Lord Herschell is followed by a judgment of Lord Hannen. Lord Hannen was a party to the judgment in *Gibson* v. *Mayor of Preston*. (2) Lord Hannen says (3): "This principle"—that is to say, speaking of the principle that exempted both the surveyor of highways and the inhabitants from a civil action—" is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870 in the case of *Gibson* v. *Mayor of Preston*." (2) It seems to me, therefore, that in the present case for the present purpose the provisions in the statute of 1846 are substantially the same as the provisions in the Public Health Act of 1875 and the Public Health Act of 1848, and that under those circumstances we ought to say, as was said in *Cowley* v. *Newmarket Local Board* (4) and in *Gibson* v. *Mayor of Preston* (2), that we do not find any distinct intention on the part of the Legislature by this Act of 1846 to create any new liability. If we apply that principle, the result is that we ought to say that the corporation are not liable to be sued

(1) 4 B. & S. 361.
(2) L. R. 5 Q. B. 218.
(3) [1892] A. C. at p. 355.
(4) [1892] A. C. 345.

by an individual for damages resulting from non-feasance any more than the inhabitants of the parish would have been. Of course I am not forgetting that when you sought to sue the inhabitants of a parish in a civil action there were technical difficulties, but, without lengthening my judgment by referring to the cases upon the subject, it is perfectly plain that that technical answer to the action was not the only ground upon which it was held that there was no such liability to a civil action. The only other matter I have to deal with, and that I said I would deal with, is the question, Does the presence of s. 58 of the Act of 1846 make any difference?—"And be it enacted that the said mayor, aldermen, and burgesses shall be liable to be indicted at common law for the want of the sufficient repair of any public highway within the said borough in the same manner as any person or persons liable to the repair of such highways was or were before the passing of this Act." It is said, as I understand, by Mr. Danckwerts, that those words "person or persons" would cover the liability of persons who were liable to repair, not by the common law, but, say, by ratione tenuræ, and he suggests that by reason of the provisions in that section you find a distinct intention on the part of the Legislature to impose upon the corporation of Liverpool a liability to be sued in civil actions when an individual has sustained damage by reason of the non-performance of the obligation to keep the roads in proper repair. I cannot agree that there is anything in that section to make it right that we should find a distinct intention on the part of the Legislature to do that. I think that, having regard to the legislation that has taken place and to the various decisions which have been given, we ought, in construing this Act of Parliament, to start with a primâ facie presumption that in the transfer of the common law obligation to repair lying upon the inhabitants of the parish at large and on other bodies for the purpose of the public convenience, primâ facie it must be assumed that the Legislature did not by such a transfer intend to impose any greater duty or any greater obligation upon the persons or bodies to whom the obligation was transferred than that which would have existed before the transfer. If we start with that

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primâ facie presumption, then we have to find in the Act something that shews a distinct intention on the part of the Legislature to throw upon the transferees of the obligation a larger liability. In my opinion, we cannot do so from anything that appears in this Act of Parliament. On the contrary, I think that this is an Act which was manifestly passed merely for convenience in carrying out all these duties by the public and for the public, and under these circumstances the presumption that I have spoken of is rather stronger than otherwise. I think for these reasons the judgment must be set aside, and judgment entered for the defendants.

ROMER L.J. I have arrived at the same conclusion. No case was proved or made by the plaintiff at the trial of the action that the highway in question was one of the ancient or special streets which the corporation of Liverpool were liable to repair by prescription, as stated in the preamble to the Act of 1830. Therefore I need not consider whether, if that fact had been proved by the plaintiff, the corporation before the Act of 1830 would have been liable to an action for damages for non-repair, or whether, if the corporation had been so liable, that liability passed, first by the Act of 1830 to the commissioners thereby appointed, or secondly under the Act of 1846 to the present defendants. It was admitted in the Court below, and on the appeal before us it was argued on the same footing, that the case is to be determined on the hypothesis that the highway in question was one originally repairable by the inhabitants of the parish of Liverpool. Now clearly those inhabitants would not have been liable to an action for damages for non-repair. That was finally determined by the case of *Russell* v. *Men of Devon*. (1) That being so, the next question that arises is, Were the commissioners appointed by the Act of 1830 thereby made liable to such an action? Of course in considering that question the fact of there being such ancient streets as stated in the preamble to the Act is to be borne in mind so far as relevant in construing the Act; but, before coming to the special provisions of the Act of 1830, I

(1) 2 T. R. 667; 1 R. R. 585.

desire to make some observations on some questions of principle governing the construction of such Acts as those of 1830 and 1846. Now in the first place it has been said that the reason why the inhabitants of a parish were held not liable for non-repair was merely because, as a matter of form, they could not be sued by a member of the public injured by the want of repair. It was said that if you find the liability to repair formerly placed on the inhabitants of a parish transferred by an Act of Parliament to a new corporation or body created for the purpose of taking over that liability to repair, then, inasmuch as the new body or corporation could be sued, there was no longer any reason why an action should not lie against that new body for non-repair of the highway. That view, however, has long since been shewn to be wrong, although from time to time the contention crops up again, and is freshly urged. In *Cowley* v. *Newmarket Local Board* (1) Lord Halsbury L.C. deals with the point, after referring to the case of *Russell* v. *Men of Devon* (2): "That that has been considered to be the law for now more than a hundred years is certain, and as has been pointed out, the objection in point of form to an action against the surveyor of the highways was not only an objection of form, but underlying it there was the objection of substance. The question of whether it was form or substance came before the Court of Exchequer in *McKinnon* v. *Penson*. (3) The effort there had been to argue that, inasmuch as the county could not in point of form be sued, and that previous judgments had referred to that fact, the 43 Geo. 3, c. 59, s. 4, which enacted that the county might be sued in the name of its surveyor, disposed of the objection of form, as indeed it did. But the Court went on to say that that statute did not give, and was not intended to give, an action for such an injury against the county, but that in cases where rights could be maintained against the county an action might be brought against them in the name of their surveyor. That was therefore a distinct authority that no new right of action was intended to be created, and so far as I am aware that has

(1) [1892] A. C. at p. 350. (2) 2 T. R. 667; 1 R. R. 585.
(3) 8 Ex. 319; 9 Ex. 609.

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continued to be the state of the authorities down to the present time." Furthermore, I think that certain other principles are now established with reference to the Acts of Parliament which create new bodies, with duties and obligations cast upon them to do the repairs of highways in lieu of the inhabitants of the parish. Modern authorities shew that the question whether in such cases the liability to an action for damages for non-repair is thrown upon the new body created by an Act of Parliament such as I have mentioned, and such as those of 1830 and 1846 in the present case, is one to be gathered from the wording of the special Act. And it was pointed out in the case of *Municipality of Pictou* v. *Geldert* (1) by Lord Hobhouse, who delivered the judgment of the Privy Council in that case, that, "It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shewn that the Legislature has used language indicating an intention that this liability shall be imposed." I need not go through these modern authorities in detail. I think the result of them, and in particular of the case of *Cowley* v. *Newmarket Local Board* (2), is accurately summed up by Mathew J., as he then was, in the case of *Saunders* v. *Holborn District Board of Works* (3), where he says: "The result of these decisions is plain—it is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute it must be shewn that the Legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the Legislature is clearly disclosed, no action will lie." As I have said, those observations appear to me to accurately sum up the authorities, treating the observations of Mathew J. as being confined, as I think they were intended to be, to the question of the construction of such Acts of Parliament as those that I have been referring to. But I ought, before parting with the question of principle, to say a word about the

(1) [1893] A. C. 524, at p. 527. (2) [1892] A. C. 345.
(3) [1895] 1 Q. B. at p. 68.

case of *Hartnall* v. *Ryde Commissioners* (1), for, as I understand the judgment of the learned judge of the Court below, he seemed to feel himself constrained to decide this case in the way he did, contrary to his own judgment, because he thought he was bound to do so by the authority of that case. Now, with regard to *Hartnall* v. *Ryde Commissioners* (1), I must say I think that case cannot now be regarded as law, if and so far as it seems to indicate an opposite view on the question of principle to that which I have previously expressed, or to lay down as a general proposition that the mere fact of a new body being created with the duty and liability to repair in itself makes that new body liable to an action for non-repair. That case, if it is to be supported at all at the present day, must be treated merely as a decision on the special wording of the Act there in question. I must, however, say that, governed by the light of more recent authorities, to which I have referred, I think I should not myself now, if obliged to construe the Act there in question, arrive at the same conclusion as that arrived at by the judges who decided that case.

Now, applying those principles to the Acts in the present case, it seems to me to follow that the defendants are not liable in the way suggested by the plaintiff. When I turn to the Act of 1830, though I bear in mind the preamble to which I have previously referred, I find that in ss. 75 and 76 the general scope of the duties of the commissioners is referred to as being that of the surveyor of highways. I find a special provision at the end of s. 76 with regard to the liability to repair, and it is noticeable that it runs in this form—namely, that it provides that such of the streets and highways as were dealt with by the Act as were theretofore repaired or repairable by the mayor, aldermen, and burgesses—that is to say, the ancient and particular streets to which I have previously referred—"shall from and after the passing of this Act be repaired and repairable and have sewers made therein and kept in repair by the said commissioners." In other words, their express liability to repair is not extended to the streets repairable by the inhabitants of the parish. On the

(1) 4 B. & S. 361.

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construction of that Act, therefore, I have no doubt that the commissioners would not by virtue of that Act be placed in the position of being liable to an action for non-repair of the highways repairable by the inhabitants of the parish of Liverpool. That brings me to the last question on this point of law—namely, the question of the construction of the Act of 1846.

With regard to that Act I may say shortly that, when I look at the preamble and the provisions of it, and especially when I look at ss. 36 and 37, I come to the conclusion that, speaking generally, the Act of Parliament intended to impose upon the new body created by that Act to repair the highways only limited liabilities. Sects. 36 and 37 generally say that the new body shall be subject to all the liabilities to which surveyors of highways are now by law subject, or may hereafter be subject. Now surveyors of highways certainly would not be liable as such, merely as surveyors, to an action for damages for non-repair. And one certainly cannot gather from ss. 36 and 37 any intention to cast upon the new body any such general obligation as that now insisted upon by the plaintiff. The only other section which avails the plaintiff is s. 58. That has already been read by my Lord, and all I will say is this—that, in my opinion, not only does it clearly not carry the liability of the new body beyond indictment so as to extend the liability to an action for non-repair, but I cannot help thinking that on the true construction it shews that it was intended that the liability of the new body, beyond the general liability to which the surveyors of highways would be liable, was to be limited to the remedy by indictment. That ends the case; and the conclusion, therefore, I arrive at is that the defendants are under no liability to the plaintiff in this action for non-repair. On the question of fact I need only say that, in my opinion, there was no evidence against the defendants of misfeasance by them as distinguished from non-feasance. I think it is clear that the accident occurred to the plaintiff merely by reason of a hole which existed in the highway solely by reason of non-repair, and for no other real reason. It follows that, as I have said, in my opinion the appeal should be allowed.

STIRLING L.J. I am of the same opinion. I agree with what has been said by my brethren, and I will add but very few words.

The action is brought against the corporation of Liverpool to recover damages caused by the non-repair of a street within the borough. Now if this street is to be taken upon the admissions made in the Court below and in the course of the arguments before us to be a street which originally was repairable by the parish, no action could have been maintained against that parish by reason of non-feasance on their part. I think it must be taken in this case, as I understand the learned judge to have found, that no misfeasance was proved, and, therefore, it is simply a case of non-feasance. The duties which originally fell upon the parish of Liverpool have been transferred to the corporation of Liverpool by a statute, and the action is based upon the provisions of that statute. I take the law to be as it is stated by Lord Hannen in the passage which has already been read by my Lord, that in dealing with a statute of this kind it is not to be inferred that a new liability is created unless a distinct intention on the part of the Legislature to that effect can be found in the terms of the Act. That brings us to consider the terms of the Act. We start with this, that in the year 1830 an Act was passed which appointed certain commissioners to control the highways within the parish of Liverpool, part of which were at that time repairable by the parish and part by the corporation by prescription. The corporation were by that Act released from their obligations of repair upon terms of paying a sum of 5000*l.* per annum to the parish for purposes of the Act. The Act of 1846, with which we have to deal, repealed that Act of 1830, and the main ground on which it was passed was the great growth which had taken place in the intervening time in the development of Liverpool. After reciting the various Acts, the preamble goes on to recite that the borough of Liverpool included various other townships there specified, and had become extremely populous, and that it was expedient that provision should be made for dealing with streets and sewage—reading it shortly—and it was also expedient that these places should be combined under one

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management, and should be uniform throughout the whole of the borough. Then, as regards the streets, the provisions which deal with those are in ss. 36, 37, and 38, which, as was correctly pointed out in argument, resemble the Public Health Act of 1875, ss. 144 and 149. These sections standing by themselves certainly do not, read in the light of the decision of the House of Lords in *Cowley* v. *Newmarket Local Board* (1), impose any new liability.

Then we come to s. 58, which has already been referred to; and I will also refer to s. 160, which shews that though the various parishes and townships which then constituted the borough were brought under the control of the corporation for the purposes mentioned, yet it was provided that for rating purposes they should be separate districts. And by s. 161 it was also provided that the mayor, aldermen, and burgesses should continue out of the borough fund to pay the sum of 5000*l.*, as to which a liability was imposed by the Act of 1830. Are we to infer, looking at the Act as a whole, that these provisions, more particularly those which I have enumerated, and reading all the sections together, intended to impose a new liability on the corporation, and to make the corporation liable for non-feasance where the parish would not have been liable? I am unable to arrive at that conclusion. It seems to me that s. 58 was merely intended to provide convenient machinery by which the remedy of indictment might be put in force, and that the person who complained of non-repair should not be driven to consider what person or persons, whether corporation, or parish, or township, were the proper parties to be indicted, and that the indictment should lie in such a case against the corporation. I cannot see under s. 58 any intention on the part of the Legislature to impose a liability which previously did not exist. For these reasons I agree that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *F. Venn & Co., for E. R. Pickmere, Town Clerk, Liverpool; Charles Russell & Co., for T. P. Maguire, Liverpool.*

(1) [1892] A. C. 345.

H. C. R.

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Cheque—Forged Indorsement—Payee a "Fictitious or Non-existing Person"—Belief or Intention of Drawer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.

The plaintiffs, market salesmen, had in their employ a confidential clerk and cashier whose duty it was to fill up cheques payable to the order of various customers of the plaintiffs with the names of such customers and the amounts payable to them respectively, to obtain the signature of the plaintiffs thereto, and then to post the cheques to the customers. In the course of the years 1901 to 1903 the clerk made out twenty-seven cheques to the order of various customers, amounting in all to 487*l.*, obtained the signature of the plaintiffs thereto, and misappropriated them, and, having forged the indorsements, negotiated them with the defendant, who gave full value for them in good faith and obtained payment of them from the plaintiffs' bankers. On an action to recover from the defendant the amount so received:—

Held, that in the circumstances of this case it was impossible to come to the conclusion that the plaintiffs when drawing these cheques had used the names of their customers by way of pretence only, and consequently that the payees were not "fictitious" persons within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, that the fraudulent indorsements by the plaintiffs' clerk were no authority to the defendant to hold these cheques, and that the plaintiffs were entitled to judgment for the amount claimed.

Bank of England v. *Vagliano Brothers*, [1891] A. C. 107, and *Clutton* v. *Attenborough & Sons*, [1897] A. C. 90, distinguished.

THIS was an action to recover a sum of 487*l.*, the value of twenty-seven cheques drawn by the plaintiffs and cashed by the defendant in the circumstances hereinafter stated, which raised the question whether the payees were "fictitious" within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, which provides that, "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." The facts were as follows: The plaintiffs, Messrs. Vinden & Rogers, were salesmen in Covent Garden Market. The defendant was a draper in the Brixton Road. From the year 1896 to the year 1903 the plaintiffs had in their employment a cashier and confidential clerk named Rowland Cross; part of his regular duties was to fill up.

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cheques payable to the order of customers of the plaintiffs, who were growers for whom fruit and vegetables had been sold, with the names of the customers and the amounts payable to them respectively; these cheques were then submitted to the plaintiff Vinden, the partner who attended to this particular part of the business, who signed them, and they were then sent off by post to the customers in the usual way. At times a slightly different practice was adopted, namely, when it was probable that the plaintiff Vinden would not be at the office on the day when cheques had to be sent out, he used to sign a few cheques in blank, leaving the names of the customers and the amounts to be filled up by Rowland Cross afterwards, as required.

During the years 1901, 1902, and 1903 Rowland Cross drew twenty-seven cheques, amounting in all to 487*l.*, obtained the signature of the plaintiff Vinden thereto, and then, instead of posting them to the various customers, took them away and appropriated them, and, having forged the indorsements, obtained cash for them from the defendant, who was a neighbour of his, and at whose shop Rowland Cross and his wife were in the habit of dealing. The defendant passed these cheques through his own banking account, and had the proceeds placed to his credit. Some time in 1903 the plaintiffs had occasion to dismiss Cross, his frauds were discovered, and he was prosecuted and convicted. No imputation was made against the defendant, who had also been deceived by Cross, whom he had at the time every reason to believe to be a respectable person, and a customer whom he had been willing to oblige by changing cheques for him, and the question was argued as one of law—namely, which of these two innocent persons was to suffer through the fraud and forgery of Cross.

The actual cheques had been destroyed in the usual course of the plaintiffs' business, so that it was not possible to prove at the trial the exact date on which they were signed, and the dates taken were those on which they were debited against the plaintiffs by the bank in the pass-book. With the exception of one cheque for 20*l.*, in favour of a customer for an amount actually due at the time that cheque was believed to

have been drawn, and in respect of which 20*l.* had been paid into court by the defendant, all the cheques were treated in the argument as having been filled up for sums not actually owing to the respective customers therein named at the time the cheques were signed. It was also admitted for the purposes of this case that there was no material difference between cheques filled up with the names of customers and amounts before signature, and cheques signed in blank and filled up afterwards by Cross with names and amounts.

The action was tried with witnesses before Warrington J. sitting as an additional judge of the King's Bench Division, but there was practically no dispute as to the facts.

M. Lush, K.C., and *Ashton Cross*, for the plaintiffs. In order to keep this money the defendant must shew either that he is a holder in due course, or that, by reason of the circumstances under which these cheques were signed, the names were "fictitious" names within the meaning of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882; but as the payees in each case were customers of the plaintiff whom Vinden at the time of signing these cheques intended to pay, they were not "fictitious" payees, and the case is distinguishable from *Bank of England* v. *Vagliano Brothers* (1) on that ground. In *Bank of England* v. *Vagliano Brothers* (1) the fraudulent clerk manufactured a document which never was a bill of exchange at all, because nobody ever drew it: it was a forgery from first to last; the name of the payee was never intended to be the payee, and by fraud the acceptor was induced to accept a thing which never was a bill of exchange. The cheques here were perfectly genuine, the payees were all well-known customers, and the drawer at the time intended to pay them the amounts named. *Clutton* v. *Attenborough & Sons* (2) is not applicable to the present case, for there the House of Lords had only to consider the meaning of the word "non-existing" person. In both those cases there never was a contract; in the present case there was a contract to pay, and these cheques were perfectly good negotiable instruments: that is the main distinction

(1) [1891] A. C. 107. (2) [1897] A. C. 90.

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between the present case and *Bank of England* v. *Vagliano Brothers*. (1)

[*Gibson* v. *Minet* (2) and *Gibson* v. *Hunter* (3) were also referred to as illustrating the earlier history of the Bills of Exchange Act.]

Secondly, the defendant is not a holder in due course; there were suspicious circumstances about these cheques in the hands of Cross which ought to have put the defendant upon inquiry; having made no inquiry, he obtains against the plaintiffs no better title than Cross had: *London Joint Stock Bank* v. *Simmons*. (4) On either of these grounds the plaintiffs are entitled to succeed.

S. T. Evans, K.C., and *Bailhache*, for the defendant, were not called on with reference to the question of the defendant being a holder in due course. As to the payees here being "fictitious," the observations of Lord Halsbury and Lord Herschell in *Bank of England* v. *Vagliano Brothers* (1) are conclusive. There were two points in that case—first, that the contract was altogether fictitious; and, secondly, that the indorsee was a "fictitious" person. There was no contract in the present case. The payees could not have sued; they could not have given a discharge; there was nothing to give a discharge for; there was no indebtedness. If these cheques had come to the hands of the payees they would have had no right to pass them on or hold them; the money was not due to them; the whole transaction was fictitious, and quâ this transaction they were "fictitious" persons. In *Bank of England* v. *Vagliano Brothers* (1), Petridi & Co. were real persons, and Vagliano, the acceptor, intended to pay them, just as here Vinden intended to pay these customers, and yet the payee was held to be "fictitious." That case exactly covers the present. In *Clutton* v. *Attenborough & Sons* (5) the facts are very like the present, and the reasoning of that case applies. The plaintiffs' claim, therefore, fails, and the action should be dismissed.

(1) [1891] A. C. 107.
(2) (1791) 1 H. Bl. 569; 1 R. R. 754.
(3) (1793-4) 2 H. Bl. 288; 1 R. R. at p. 756.
(4) [1892] A. C. 201, at p. 217.
(5) [1897] A. C. 90.

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Lush, K.C., in reply. In considering the observations in *Bank of England* v. *Vagliano Brothers* (1) one must bear in mind the peculiar facts of that case, and notably, that there being in fact no drawer, the use of a name as a payee was a fiction, although the payee actually existed. Though the banker is protected in the case of a forged indorsement, still that protection does not extend to the person who takes the cheque upon the faith of such forged indorsement: *Ogden* v. *Benas.* (2) The facts of this case clearly distinguish it from *Bank of England* v. *Vagliano Brothers.* (1)

WARRINGTON J. The question I have to decide in this case is, what is the true construction of s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, applied to the facts of this particular case; that is to say, in other words, I have to decide whether in the case before me the payees of certain cheques were fictitious or non-existing persons within the meaning of that 3rd sub-section.

The facts of the case are simple. [The learned judge shortly stated the facts as above, observing that in this particular case it made no material difference whether the cheques were signed before or after they had been filled up by Cross, and continued:—]

On these facts I have now to decide whether the defendant Hughes is liable for the moneys which he thus paid to Cross. With the exception of one cheque for 20*l.*, for which liability has been admitted and the money paid into court, the case I have to deal with is one where there was no money owing to the customer, or a sum less than the amount of the cheque, at the time it was drawn.

Is the person whose name was inserted in each of these cheques by Cross a "fictitious" person within the meaning of the Bills of Exchange Act? I thought at one time that the case was covered by the second branch of the judgments in *Bank of England* v. *Vagliano Brothers.* (1) I will come back to that presently, merely saying in passing that on further consideration I do not think those judgments do cover this

(1) [1891] A. C. 107. (2) (1874) L. R. 9 C. P. 513.

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case. Independently of authority, what am I to say is meant by "fictitious"? It seems to me this at all events must be true. It cannot be fictitious in the abstract. You must look at the circumstances of the particular case, and say whether the name of the person inserted in the bill, is the name of a fictitious person having regard to all those circumstances.

In this case let us consider what was the position of Mr. Vinden when he signed these cheques. It was not a fiction to him then. It was intended to be, and was to him at that moment, a perfectly real transaction. He believed that he owed the sum of money represented by the cheque to the person whose name appeared upon it, and he signed the cheque in that belief. It was only when he discovered that he had been imposed upon by his clerk that there was, I will not say a fiction, but that there was anything that was not real and in accordance with his intention. I think I am entitled to say that the fraud perpetrated upon him has really nothing to do with the construction of the Act of Parliament, and that what one has to look at (and the only thing one has to look at for the purpose of construing that Act) is the state of things at the time the cheque was drawn. At the time the cheque was drawn he intended to pay (I will take the first one on the list) "T. H. Graves" the sum of 29*l*. T. H. Graves, by the way, is not a non-existent person. I should have said on that that T. H. Graves is not a "fictitious" person.

Now is there any authority to the contrary? The first case to which I will refer, though not first in point of date, is *Clutton* v. *Attenborough & Sons*. (1) That case was almost exactly like the present, except that there the drawee of the cheque was a non-existent person, and the learned Lords who decided that case had not to consider the question which I have to consider, namely, what is the construction of the word "fictitious," and if the principal speech, that of Lord Halsbury, is looked at, I think that is plain. At the bottom of p. 93 he alludes to the fact that the word he is dealing with is "non-existent," and that there might be questions arising if he had been driven to discuss the meaning of "fictitious." I

(1) [1897] A. C. 90.

think I may, therefore, pass by that case by saying it really is no authority for the present, inasmuch as the House of Lords were dealing there, not with the word "fictitious," with which I have to deal, but with a different word—"non-existent."

Now does *Bank of England* v. *Vagliano Brothers* (1) carry it any further, or rather, is that case any authority on the particular question which I have to decide? In *Bank of England* v. *Vagliano Brothers* (1) the facts were very special and very peculiar; the document with which the House of Lords had to deal was a document purporting to be drawn by a drawer, really accepted by an acceptor, and in favour of a real payee—that is to say, not a non-existing payee. I say advisedly purporting to be drawn by a drawer, because it was not drawn at all, the name of the drawer being forged. The two learned Lords whose judgments have been most relied upon in this case were Lord Halsbury and Lord Herschell. I think it is enough for me to refer to what Lord Herschell says on the question raised in the present case as to the meaning of the word "fictitious." One must bear this in mind—that in the case with which he had to deal, there being no drawer in fact, the use of a name as payee was a mere fiction, although the payee actually existed. I think all the expressions which have been referred to in his judgment in support of the defendant's case here are explained by that fact, and I think he is not dealing with the case of the drawer of the document intending to issue the document, and intending to issue it with the name of the particular payee upon it, that payee not being non-existent. On p. 152 he says this, and this is a passage which was relied upon as summing up what he means: "Do the words, 'where the payee is a fictitious person,' apply only where the payee named never had a real existence? I take it to be clear that by the word 'payee' must be understood the payee named on the face of the bill; for of course by the hypothesis there is no intention that payment should be made to any such person. Where, then, the payee named is so named by way of pretence only, without the intention that he

(1) [1891] A. C. 107.

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shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not—that it is an entry made for the purpose of pretending that the transaction took place which is represented by it." Then again, later on, he says: "It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is feigned or pretended, or, in other words, a fictitious person." Now those passages which I have read, which were the passages mainly relied upon by the defendant, would be satisfied entirely by the case in which the drawer drawing the cheque puts into it the name of the person who exists, but whose name is inserted by mere pretence. In the present case let us test it. Take those words of Lord Herschell. Did Mr. Vinden draw this cheque in favour of T. H. Graves and the others as a mere pretence? It is impossible to come to that conclusion on the facts of this case. It was not a mere pretence at the time he drew it. He had every reason to believe, and he did believe, that those cheques were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those cheques. That seems to me really to answer the defendant's case. I confess that I was much impressed by those passages in Lord Herschell's judgment and in Lord Halsbury's judgment; but when you come to see what it is they are directing their minds to, I think one appreciates that they are not really expressions which govern, or were intended in any way whatever to govern, such a case as that which I have now before me.

I come to the conclusion, therefore, that in this case the names of the payees were not fictitious, or rather, to use the expression in the Act, which curiously enough says nothing about names, I come to the conclusion that the payees in these cases are not fictitious or non-existing persons; that the bills,

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therefore, cannot be treated as payable to bearer; that the forged indorsement, therefore, did not entitle the defendant to receive payment of the amounts of the cheques; and that accordingly he is liable to the plaintiffs for the loss that has been sustained.

In the view I take of the law it is unnecessary to say whether or not the defendant is a holder in due course; but, as I have heard the evidence on that point, I think it is desirable that I should express my view upon it, which is, that there was nothing here which I can see, so to put the defendant upon inquiry as to render his payment to Cross anything but bonâ fide. If that is so, then he would be a holder in due course; but as I say, it is unnecessary for me, in the view I take of the law, to decide that point.

The result will be that there will be judgment for the plaintiffs for the amount claimed, less the 20*l.* paid into court, and costs.

Solicitors: *Hervey, Smith & Co.; John T. Lewis.*

W. C. D.

C. A.
1905
April 4.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* MERSEY DOCKS AND HARBOUR BOARD.

Action for Damages for Death of Deceased Person—Statute of Limitations—Deceased's Right of Action barred—Public Authority, Action against—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 1—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*a*).

An action can only be maintained by the representative of a deceased person under the Fatal Accidents Act, 1846, where that person could, if alive, have himself maintained an action in respect of his injuries against the defendant.

The husband of the plaintiff, having in 1902 sustained injuries, as it was alleged, through the negligence of the defendants, a public authority, ultimately died of those injuries in 1904. The plaintiff having commenced an action against the defendants under the Fatal Accidents Act, 1846, to recover damages for his death:—

Held, that the action could not be maintained, inasmuch as the right of action of the deceased, if alive, would have been barred by the Public Authorities Protection Act, 1893, s. 1 (*a*).

APPEAL from a judgment of the judge of the Liverpool Court of Passage as after mentioned.

The action was brought by a widow under the Fatal Accidents Act, 1846, to recover damages in respect of the death of her husband, which resulted from injuries occasioned by falling into a lock belonging to the defendants, as was alleged, through the defendants' negligence in not keeping the lock properly fenced while certain repairs were being done to the lock gates. The accident happened in December, 1902, and the plaintiff's husband died of the injuries thereby caused in December, 1904. The action was commenced in February, 1905. An order had been made for the determination of a preliminary point of law, namely, whether the defendants, as a body coming within the meaning of the Public Authorities Protection Act, 1893, were protected by s. 1 (*a*) of that Act, by reason of the action not having been commenced within six

months next after the neglect alleged against the defendants. The learned judge gave judgment for the plaintiff.

The defendants appealed.

Carver, K.C., and *Leslie Scott*, for the defendants. The decision of the learned judge in favour of the plaintiff was founded on the view that the cause of action arose upon the death of the plaintiff's husband. By the Fatal Accidents Act, 1846, formerly called Lord Campbell's Act, s. 1, "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." At the time of the man's death in this case, he could not have maintained an action owing to the limitation in s. 1 (*a*) of the Public Authorities Protection Act, 1893, as no action was commenced within six months after the act, neglect, or default complained of. A series of cases shew that, where the deceased person never had or has lost in his lifetime the right to bring an action, his death confers no new right on any one. In *Senior* v. *Ward* (1) it was held that, where a servant, who was killed in the course of his employment, if alive, could not have sued his master for negligence because he had been guilty of contributory negligence, the representative of the servant could not sue under the Fatal Accidents Act, 1846. In *Haigh* v. *Royal Mail Steam Packet Co.* (2) exemptions from liability in a passenger ticket, which would have bound the deceased, were held to prevent his executors from suing under the Fatal Accidents Act, 1846. In *Read* v. *Great Eastern Ry. Co.* (3) acceptance of satisfaction by the deceased was held to be an answer to an action by the widow. In *Griffiths* v. *Earl of Dudley* (4) it was held that a contract by the workman not to claim compensation bound his representatives. In *Markey* v.

(1) (1859) 1 E. & E. 385.
(2) (1883) 49 L. T. 802.
(3) (1868) L. R. 3 Q. B. 555.
(4) (1882) 9 Q. B. D. 357.

C. A. 1905

WILLIAMS v. MERSEY DOCKS AND HARBOUR BOARD.

Tolworth Joint Isolation Hospital District Board (1) death arose from the negligence of the defendants' servants, and an action brought within the twelve months' period mentioned in the Fatal Accidents Act, 1846, s. 3, failed on the ground that it was brought after six months from the death of deceased.

Rigby Swift, for the plaintiff. The Fatal Accidents Act, 1846, gives a wholly new cause of action to the representatives of the deceased, namely, for damages for his death. The only element common to that cause of action, and that which the deceased had in his lifetime, is that they both arise out of the negligence of the defendants. The parties to the two actions are different, and the damages would be different: see observations of Selborne L.C. and Lord Blackburn in *Seward* v. "*Vera Cruz*" (2); *Pym* v. *Great Northern Ry. Co.* (3); *Blake* v. *Midland Ry. Co.* (4) *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1) is an authority to some extent in plaintiff's favour. The plaintiff's cause of action only accrued when her husband died in 1904. Her cause of action is not the neglect of the defendants to keep their lock properly fenced, and the consequent injury to her husband, but the death of her husband. Therefore the plaintiff's cause of action is not barred by the Public Authorities Protection Act, 1893, s. 1 (*a*). That Act did not destroy the husband's cause of action, but only barred the remedy by action. [He also cited *Crumbie* v. *Wallsend Local Board*. (5)]

Carver, K.C., was not called upon to reply.

MATHEW L.J. This is an appeal against the judgment of the learned judge of the Liverpool Court of Passage upon a preliminary point of law which was ordered to be disposed of before the trial of the action, namely, whether under the circumstances the plaintiff could maintain an action against the defendants by reason of the death of her husband. The action was brought under the Fatal Accidents Act, 1846, by a

(1) [1900] 2 Q. B. 454.
(2) (1884) 10 App. Cas. 59, at pp. 67, 70.
(3) (1863) 4 B. & S. 396, at p. 406.
(4) (1852) 18 Q. B. 93, at p. 110.
(5) [1891] 1 Q. B. 503.

widow to recover damages for the death of her husband, which was attributed to the negligence of the defendants. It was not disputed that the defendants were a public authority within the meaning of the Public Authorities Protection Act, 1893. The accident to the deceased man happened in the year 1902, and the action was not brought until after his death, which occurred at the end of the year 1904. The defendants contend that they are protected by the provisions of the Public Authorities Protection Act, 1893, and that the action is therefore not maintainable. It has been held by the learned judge of the Passage Court that the Act does not prevent the maintenance of the action. By s. 1 of the Public Authorities Protection Act, 1893, it is provided that, "where after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect, (*a*) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in the case of the continuance of injury or damage, within six months next after the ceasing thereof." In this case no action was brought by the deceased man in respect of his injuries, and the present action is brought by his widow after the lapse of a period much longer than six months after the act, neglect, or default complained of in the action. It appears to me clear, having regard to the provisions of the Public Authorities Protection Act, 1893, that the action is not maintainable. We have been referred to a long series of decisions on the subject, which deal with the effect of the Act of 1846 upon cases of a similar kind. It has been pointed out over and over again that the test of the right to sue under the Act is whether an action could have been maintained by the deceased in respect of his injuries. We are asked now to discard those authorities. I see no ground for doing so. It has been decided that, where an action by the deceased man was excluded by the terms of his

C. A. 1905

WILLIAMS v. MERSEY DOCKS AND HARBOUR BOARD.

Mathew L.J.

employment, no action could be maintained after his death by his representative: that, inasmuch as he could not, if alive, have maintained an action, his representative could not do so. Again, where the claim originally made by the deceased man was settled, it was held that his representative could not sue for damages for his death. In those cases it might have been argued, as it was in the present case, that a different cause of action had been given to the representative under the Fatal Accidents Act, 1846. Again, where there was contributory negligence on the part of a deceased person, it was held that his representative could not sue. The cases appear to establish the general principle that, where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative. In this case the deceased could not have maintained an action against the defendants at the time of his death, or at any time more than six months after the neglect which was said to have caused the injury to him. In my opinion the decision of the learned judge of the Passage Court was wrong and should be reversed.

COZENS-HARDY L.J. I am of the same opinion. We are really asked to overrule a series of authorities. The case of *Read* v. *Great Eastern Ry. Co.* (1) is a strong assertion of the principle upon which the defendants rely; and in that case the very point involved in the present case appears to have been put by Blackburn J., who, according to the report in the *Law Journal*, said by way of interlocutory observation: "If he had lingered for seven years, do you say that this action would not have been barred by the Statute of Limitations?" To which counsel answered: "The plaintiff is bound to contend that there would be no such bar"; that is to say that, after the expiration of any period, however long, from the date of the original injury, a new cause of action would arise under the Fatal Accidents Act, 1846, on the death of the injured man. Such a contention seems quite contrary to the principle laid down in the cases which have been referred to. Again, in

(1) L. R. 3 Q. B. 555; 37 L. J. (Q.B.) 278, at p. 280.

Seward v. "*Vera Cruz*" (1) Lord Blackburn said, with regard to the Fatal Accidents Act, 1846: "I think that, when that Act is looked at, it is plain enough that, if a person dies under the circumstances mentioned, when he might have maintained an action, if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased, if the deceased had lived." In the present case the deceased could not at the date of his death, or at any time after the lapse of six months from his injury, have maintained an action in respect of that injury against the defendants; and therefore his representative cannot maintain this action.

Appeal allowed.

Solicitors for plaintiff: *Pritchard, Englefield & Co., for Rees, Matthew Jones & Rees, Liverpool.*

Solicitors for defendants: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

(1) 10 App. Cas. 59.

E. L.

C. A.
1905
March 24.

[IN THE COURT OF APPEAL.]

GIBBON *v.* PEASE.

Architect — Plans — Completion of Work — Property in Plans — Claim of Architect — Custom — Reasonableness.

An architect was employed by a building owner to carry out alterations in certain houses. He prepared plans and superintended the execution of the work, which was completed, and his agreed remuneration at an inclusive percentage on the outlay was paid. The building owner then demanded the plans, which the architect refused to hand over. In an action by the building owner against the architect to recover the plans:—

Held, that a custom set up by the defendant entitling him as architect to the property in the plans after the completion of the work was unreasonable, and afforded no answer to the action.

APPEAL from the judgment of Ridley J. at the trial of the action without a jury.

The plaintiff was the owner of certain houses in Bayswater, which he was desirous of converting into residential flats. The defendant was an architect and surveyor, and was employed in that capacity by the plaintiff upon the work necessary to the contemplated alteration of the houses, on the terms that the defendant should receive for his services 5 per cent. on the contract price of the works to be executed. The defendant prepared plans and specifications and superintended the work, which was completed. The plaintiff paid to the defendant the stipulated fee and claimed to have the plans and specifications handed over. This the defendant declined to do, and this action was brought to recover possession of them. At the trial evidence was tendered on behalf of the defendant of a custom under which an architect, in circumstances like those of this case, was entitled to retain the plans and specifications as his own property. The learned judge refused to admit the evidence, being of opinion that the custom proposed to be established by the evidence was unreasonable, and judgment was entered for the plaintiff.

The defendant appealed.

M. Shearman, *K.C.*, and *H. T. Kemp*, *K.C.* (with them *Morle*), for the defendant. In general the contract between a building owner and his architect is for work and labour, and not for the purchase of plans. In the absence of stipulations as to the property in the plans the question is, What is the reasonable inference to be drawn from the contract? If the obvious intention is to get plans from the architect and nothing more, the building owner would be entitled to delivery of them to him; but if the subject-matter of the contract is to get a house built or altered, when that is done the building owner has got all that he bargained for. It is reasonable that the architect should not be called on to part with plans that he has designed and which he may want to use on other occasions. It may be admitted that the contract involves the making of plans as ancillary to the work of superintending the building or alteration of the house, but that does not affect the right of the architect to retain them when he has done the work he is called on to do. The learned judge refused to admit evidence of the custom on the authority of the decision in *Ebdy* v. *M'Gowan* (1); but that case is distinguishable from the present one. The contract was that if the house was completed the plaintiff was to receive 5 per cent. on the money expended; if tenders were given and the work was not commenced he was to receive 3 per cent. on the estimated cost; and if plans were drawn but nothing further was done he was to have 2½ per cent. on the estimated cost. The last-mentioned event happened, and under those circumstances the Court of Exchequer held that a custom which was set up, and adopted by the verdict of the jury, that the architect should retain the plans was unreasonable. The decision may be explained, consistently with the defendant's claim in this case to retain the plans, on the ground that, in the former case, the building owner would, in the event that happened, have got nothing for the payment made to the architect unless the plans were handed over, whereas in this case he has obtained all that he bargained for. It is submitted that the custom of which it was proposed to

(1) *The Times*, Nov. 17, 1870.

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give evidence was reasonable, and that the evidence ought to have been received.

Danckwerts, *K.C.*, and *Gatehouse*, for the plaintiff, were not called on.

COLLINS M.R. It seems to me that this case is covered by the principle of the decision in *Ebdy* v. *M'Gowan*. (1) The defendant is an architect who was employed by the plaintiff on a verbal contract to do all that was necessary to be done as an architect in designing and carrying out a certain building operation on some houses belonging to the plaintiff. The remuneration of the defendant was to be at the rate of 5 per cent. on the total outlay. It was not disputed that the employment involved the preparation and drawing of plans, nor was it disputed that plans were made and used in carrying out the building operations. When the work was done the building owner paid the contract price and claimed the plans. The defendant refused to give them up, contending that by the custom of the profession he was entitled to retain them. The plaintiff brought this action to recover possession of them, and it came before Ridley J., and evidence was tendered in support of the custom set up on behalf of the defendant. The learned judge held that if the alleged custom existed it was not one that would bind the public. I am not sure that the learned judge was satisfied as to the existence of the custom; but, however that may be, he held, on the authority of *Ebdy* v. *M'Gowan* (1), that it was so unreasonable that the Court would not give effect to it. It has been argued before us that the case referred to was distinguishable from the present one. The principle on which the right of the defendant to keep the plans is rested in this case is that the contract between the parties was not for the sale of a chattel, but for work and labour, and that the defendant completed his part of that contract when the work had been finished under his superintendence. In *Ebdy* v. *M'Gowan* (1) there was a contract with a provision for its termination at certain stages of the

(1) *The Times*, Nov. 17, 1870.

contemplated work. The plaintiff was employed by the defendant to prepare plans with reference to the rebuilding of a vicarage. If the work was carried through the remuneration was to be at the rate of 5 per cent. on the outlay; if the matter only got as far as the procuring of tenders the remuneration was to be 3 per cent. on the estimated cost; and if plans were made and nothing further was done the architect was to get 2½ per cent. on the estimated cost. Plans were prepared, but before anything else was done the building owner made up his mind not to proceed further. He was willing to pay the 2½ per cent., but he required that the plans should be handed over to him. The architect refused to hand over the plans and sued for payment, setting up a custom among architects to retain their plans if the work was not proceeded with. It was held by the Court of Exchequer that such a custom, even if it were proved, would be unreasonable, and that the building owner need not pay for the plans unless he obtained them. The custom set up, if it could have been justified, must have been so on the ground that is urged in support of the custom in the present case—namely, that the contract was for work and labour to be done and had no bearing on the property in the plans. If the custom set up in that case was bad, that set up in this case is equally bad, for it can make no difference that in the former case there was a sub-division of the contract into parts having relation to different stages of the contemplated work. In my opinion the contract in this case resulted in the making of plans the property in which passed to the building owner on payment of the remuneration provided under the contract. I find a difficulty in distinguishing this case from that of a contract to paint a picture or to design a coat of arms, as to which no question of ownership could arise. The case on which the learned judge based his decision was decided in the year 1870, and has never been impugned. In my opinion it was rightly decided, and this appeal must be dismissed.

MATHEW L.J. I agree that the appeal should be dismissed for the reasons given by the Master of the Rolls.

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COZENS-HARDY L.J. I am of the same opinion. The principle which governs this case cannot, in my opinion, be distinguished from that which governed the decision of the Court in the solicitor's case, *Ex parte Horsfall* (1), to which I referred in the course of the argument. In that case, as in this, there was a contract for the performance of certain work. There were things which were necessary for the completion of the actual deed of conveyance, which was what the parties bargained for, and though a custom was set up by the solicitor of a right on his part to retain drafts and copies of deeds and documents, the originals of which he was admittedly bound to deliver up, the Court decided that the client who had paid for them had a right to the possession of them. If one considers the matter from the point of view of the reasonableness of the custom set up, the argument seems to me to be entirely in favour of the building owner. What would be his position after the building was completed? Unless he has the plans, how is he to know where the drains, the flues, and many other things are? Is he bound to go to the architect and make a fresh contract with him with respect to every matter that arises relating to the structure? Counsel for the defendant were bound to admit that, if their view as to the retention of the plans is correct, there would be some sort of obligation on the architect for their safe custody; but that admission does not make the retention reasonable. In my opinion the decision of the Court of Exchequer in 1870 was right, and this Court ought to follow the ruling in that case.

Appeal dismissed.

Solicitors for plaintiff: *Gibbon & Moore.*
Solicitors for defendant: *Charles Robinson & Co.*

(1) (1827) 7 B. & C. 528; 31 R. R. 266.

A. M.

[IN THE COURT OF APPEAL.]

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LAW GUARANTEE AND TRUST SOCIETY *v.* RUSSIAN BANK FOR FOREIGN TRADE AND OTHERS.

Shipping—Mortgage of Ship—Mortgagors in Possession—Contract impairing the Security—Charterparty for Carriage of Contraband of War—Debenture Trust Deed.

Where mortgagors in possession of a ship entered into a charterparty by which she was chartered for the carriage of contraband of war to a port of one of two belligerent States, which would involve great risk of her capture by the other belligerent, and the ship was not insured against such risks:—

Held, that the mortgagees were entitled to a declaration that the charterparty was not binding on them on the ground that it impaired the security, although the ship had sailed with her cargo on the voyage under the charterparty.

Collins v. *Lamport*, (1864) 4 D. J. & S. 500, followed.

The Celtic King, [1894] P. 175, discussed.

APPEAL by defendants from judgment of Channell J. in an action tried by him without a jury.

The action was brought by the plaintiffs as mortgagees of three steamships called respectively the *Heathbank*, the *Heathburn*, and the *Heathcraig*, against the Russian Bank for Foreign Trade, the Heath Line, Limited, the owners of the steamships, and Messrs. Green, Holland & Sons, for a declaration that the plaintiffs were not bound by certain charterparties and bills of lading relating to the said ships and the cargoes then on board of them.

The defendants, the Heath Line, Limited, were a company owning a line of steamships, whose memorandum of association empowered them to carry on the businesses of shipowners under the British flag, managers of shipping property, freight contractors, carriers of goods, wares, cattle, merchandise, mails, parcels and other things, and passengers and troops, by land or sea, or partly in one way and partly in the other, and to enter into such contracts in relation to any of the above matters as the company might deem expedient. The plaintiffs were the

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trustees of a debenture trust deed entered into by the defendants, the Heath Line, Limited, to secure the holders of debentures of that company, by which the undertaking of the company, and all its property, present and future, were assigned to the plaintiffs, as a security for the payment of the debentures. By clause 1 of the deed the term, "the mortgaged premises," was stated to mean the steamships, *Heathburn*, *Heathcraig*, *Heathford*, *Heathglen*, and *Heathbank*, and other the property comprised in the deed and for the time being mortgaged to the plaintiffs. By clause 4 it was provided that, until the security became enforceable, and the trustees were in a position to enforce the same, the trustees should permit the company to hold and enjoy the mortgaged premises, and to carry on therein and therewith the business authorized by the memorandum of association of the company, and that, as regards the mortgaged premises other than the steamships thereinbefore named, the deed should operate as a floating security, but so that the company should not be at liberty to create any mortgage or charge on the mortgaged premises ranking in priority to or pari passu with the security created in favour of the debentures. Clauses 6 and 7 provided that, when the security constituted by the deed became enforceable, the trustees might enter upon and take possession of the mortgaged premises, and that the security should become enforceable on the happening of each and every of certain events, among which was the breach by the company of any covenant or stipulation contained in the deed. Clause 24 provided (inter alia) that the company should, during the continuance of the security, carry on and conduct the business of the company to the greatest possible advantage, and should keep proper books of account, which were at all reasonable times to be open for the inspection of the trustees, that the company should, at all times during the continuance of the security, give to the trustees such information as they should require as to all matters relating to the business, or any after-acquired property of the company, or otherwise relating to the affairs thereof, that they should insure and keep insured such of the mortgaged premises as were of an insurable nature, including the vessels for the time being subject to the security,

against loss or damage by fire to their full value in such office or offices as the trustees should appoint, and, as to the said vessels, under marine policies containing the ordinary conditions applicable to steamships with the usual collision clauses, and should deposit all such policies with the trustees, and that, whenever required to do so by the trustees, they should insure the said vessels in such office or offices as aforesaid under proper marine policies against seizure, capture and war risks. Mortgages to the plaintiffs of the three steamers to which the action related had been duly executed in the statutory form and registered. At the time when the charterparties in question were entered into, and when the action was brought, Russia was at war with Japan.

By charterparty dated September 16, 1904, and entered into between the agents of the defendants, the Heath Line, Limited, and the defendants, Messrs. Green, Holland & Sons, as agents for the charterers, the ship *Heathbank* was chartered for the carriage of a cargo of coals from Barry to Vladivostok at a freight of 40*s.* per ton, of which 30*s.* was to be payable in advance on signing bills of lading. On the same date a fictitious charterparty was also entered into between the same parties in identical terms, except that the port of destination was stated to be Manila and the freight to be 16*s.* per ton. By an agreement entered into by the parties to the charterparty of the same date it was agreed that, in consideration of a charterparty of the *Heathbank* for a voyage from Barry to Vladivostok at a freight of 40*s.* per ton (30*s.* per ton payable on signing bills of lading) being entered into at the time of signing the agreement, the charterparty of the ship for a voyage from Barry to Manila at a freight of 16*s.* already entered into should be thereby cancelled, and declared to be null and void, and the Heath Line's agents undertook to attach to the bills of lading an agreement to deliver the cargo at Vladivostok in accordance with the terms of the substituted charterparty. On October 15, 1904, the *Heathbank* was loaded with a cargo of coals, and a bill of lading was signed making the cargo deliverable at Manila, and on the same day an undertaking was given by the Heath Line's agents to deliver the coals at Vladivostok. It

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appeared that the fictitious charterparty and bill of lading were drawn up in order that the ship might be announced as having cleared from Barry for a neutral port, so as to deceive the agents of the Japanese Government. Similar charterparties and sets of documents were made and executed between the same parties with regard to the steamers *Heathburn* and *Heathcraig* respectively on October 28 and December 7, 1904, with the exception that in their case the fictitious port of destination was Shanghai. The defendants, the Russian Bank for Foreign Trade, were the holders of the bills of lading for the coal. It was admitted that the coal was really intended for the Russian Government.

The ships had cleared from Barry for Manila and Shanghai respectively, and at the time of action brought they were on their way with their cargoes of coal to Vladivostok, and had respectively arrived at Amoy, Manila, and Colombo. The ships were not insured against war risks of the character involved in the charterparties. It appeared that, at the time when the first charterparty was entered into, the premium for insurance against war risks in respect of vessels bound for Vladivostok with coal was from 25 to 30 guineas per cent., to insure at which figure would have left little or no profit on the charterparties; that the premium subsequently continued rising; and that early in January of the present year such vessels became practically uninsurable against war risks, Vladivostok being then strictly blockaded by the Japanese. On March 9, 1905, the plaintiffs, having become aware in February that the steamers were engaged in carrying contraband of war to Vladivostok, passed a resolution to the effect that the defendant company had committed breaches of the debenture trust deed by not carrying on their business to the greatest possible advantage, by not giving to the plaintiffs such information as they required as to all matters relating to the company's business, or otherwise relating to the affairs thereof, and by not insuring the vessels under proper marine policies against seizure, capture, and war risks, and that the plaintiffs did therefore enter upon and take possession of the mortgaged premises in accordance with the powers of the

trust deed, and that the seal of the society should be affixed to a deed-poll appointing an agent on their behalf to enter upon and take possession of the mortgaged premises accordingly. Channell J. held that the charterparties were such as to impair the security of the mortgagees and, therefore, according to the rule laid down in *Collins* v. *Lamport* (1), were not binding on the mortgagees. He consequently gave judgment for the plaintiffs for the declaration as claimed.

Scrutton, K.C., and *Leck*, for the defendants, the Russian Bank for Foreign Trade. Whatever may be the rights as between the mortgagees and the shipowners, as between the mortgagees and the charterers and holders of the bills of lading, these charterparties were valid. It is well established that, subject to the limitation mentioned in *Collins* v. *Lamport* (1), a mortgagee of a ship cannot treat as invalid the contracts for its use entered into by a mortgagor who has been allowed to remain in possession. Such contracts may be regarded as authorized by the mortgagee: see *Johnson* v. *Royal Mail Steam Packet Co.* (2) The charterers, as a matter of business, were not bound to search the register of mortgages to see whether the ships were mortgaged, and as between the mortgagees and the charterers charters entered into by the mortgagors in possession in the ordinary course of the mortgagors' business were valid. There is no case, except perhaps *The Celtic King* (3), in which the limitation mentioned in *Collins* v. *Lamport* (1), namely, that the contract must not be such as to impair the security, has been applied, and a contract made by a mortgagor who remained in possession of the ship has been declared void against the mortgagee, pending the performance of the contract. It would be a great hardship on charterers or holders of bills of lading who had no notice of the mortgage, as was the case with these defendants, that, after the cargo has been shipped, and the vessel has with it reached a remote part of the world, the charter should be declared not binding on the mortgagees. The mortgagees, having left the

(1) 4 D. J. & S. 500. (2) (1867) L. R. 3 C. P. 38.
(3) [1894] P. 175.

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mortgagors in possession of the ships as apparent owners, cannot avoid lawful contracts made by them in the usual way of business. These were perfectly lawful contracts, and such as are often entered into by shipowners.

[They cited on this point *Keith* v. *Burrows* (1); *The Heather Bell* (2); *The Fanchon* (3); *Cory Brothers & Co.* v. *Stewart* (4); *The Maxima* (5); *Williams* v. *Allsup.* (6)]

In this case it is submitted that the debenture trust deed gave authority to the mortgagors to bind the mortgagees by such contracts as these charterparties. Clause 4 of the deed authorizes the mortgagors to carry on business in accordance with their memorandum of association, which would cover the use of the ships for such voyages as those in question; and, reading that clause with clause 24, the deed appears to contemplate that such risks would be incurred, and that the mortgagors might enter into charterparties involving war risks, the right being reserved to the mortgagees to require that an insurance against such risks should be effected. In this case the mortgagees never inquired as to the nature of the ships' employment at the time when the charterparties were entered into, and they never required an insurance against the war risks thereby involved. At the time when the charterparties were entered into such insurances would have been possible, though the premiums would have been high. The mortgagors were entitled as against the mortgagees to make these charterparties, leaving it to them to require insurances if they thought proper.

Pickford, K.C., and *Maurice Hill* (*W. H. Cozens-Hardy* with them), for the plaintiffs. There can be no doubt that, as a matter of fact, these charterparties were such as to impair the security. There is also no question that the general principle is that, although a mortgagor left in possession of the ship has authority to use her in the ordinary course of business, yet, if he makes a contract which impairs the security, the mortgagee can take possession and that contract will not be binding on

(1) (1877) 2 App. Cas. 636.
(2) [1901] P. 272.
(3) (1880) 5 P. D. 173.
(4) (1886) 2 Times L. R. 508.
(5) (1878) 39 L. T. 112.
(6) (1861) 10 C. B. (N.S.) 417.

him. It makes no difference, on the authorities, whether the mortgagee interferes before or after the contract has begun to be carried out. *The Celtic King* (1), unless overruled, is an authority to this effect; and in that case the principle appears to have been applied, although the contract in question there was made before the mortgage. There is no special hardship in such a case upon the charterer or cargo owner. He must be taken to know that the ship may be mortgaged, and he can ascertain whether that is so from the register of mortgages. If he chooses not to examine the register, he takes the risk of there being a mortgage on himself. It is said for the defendants that the mortgagees did not inquire as to the nature of the ships' employment at the time the charterparties were made, and that they did not require insurances to be effected against war risks under these charterparties as they might have done; but care was taken by the charterers and mortgagors to conceal the real nature of the intended voyages by fictitious documents, which primarily, no doubt, may have been intended to deceive the Japanese agents in this country, but which were calculated to mislead any one. The mortgagees cannot, as a matter of business, be applying every day to the mortgagors for information as to what they are doing with the ships. With regard to the suggestion that the risks might have been covered by insurance, that fact, if true, could not affect the nature of the contract which is such as to impair the security; and in the present case the premium for insurance on such risks at the time of the making of the charterparties was so high that an insurance would have eaten up all the profits on the charterparties, and at a later date such risks became practically uninsurable; so that under the circumstances of this case there could be no question of insurance. The provisions of the debenture trust deed do not really affect the case. Clause 4 does not in truth give the mortgagors any authority with regard to the ships beyond that which they would have by ordinary law. Clause 24 is a clause for the protection of the mortgagees, and cannot be read as giving the mortgagors authority to make such charterparties as those in question; and, even if

(1) [1894] P. 175.

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the scope of the clauses were such as suggested, it would not authorize them to do so without giving information to the trustees for the debenture-holders, so that they might, if they thought fit, require insurances to be effected.

[They cited *Laming* v. *Seater*. (1)]

Scrutton, K.C., in reply.

LORD ALVERSTONE C.J. This is an appeal from the judgment of Channell J., who has held that three charterparties are not binding upon the plaintiffs as being contracts which impair the security of the plaintiffs as mortgagees within the principle laid down some forty years ago by Lord Westbury and recognised ever since. In my opinion the judgment of Channell J. was perfectly right. It is well established that the mortgagor of a ship remaining in possession can exercise the ordinary rights of an owner, until the mortgagee takes possession, but he can only do so subject to the principle laid down by Lord Westbury in the case of *Collins* v. *Lamport* (2), and restated by Lord Cairns in *Keith* v. *Burrows* (3) in somewhat different language, which I will not now repeat, as I discussed it sufficiently on a previous occasion in the case of the *Heather Bell*. (4) I will first deal with this case, apart from any consideration of the special terms of the debenture trust deed, by which the plaintiffs were constituted mortgagees of the ships in question. The mortgagors in the latter part of 1904 entered into charterparties for the carriage by three ships of cargoes of coal from Barry to Vladivostok. These were the real contracts. Fictitious documents, however, were, with the knowledge of the charterers, signed, in order to make it appear that the ships were bound for the neutral ports of Manila and Shanghai, and the ships did clear from Barry for those ports; but it is not disputed that the Russian Government was really the party interested in the coal, and it was always intended that it should go to Vladivostok. At the time when the charterparties were entered into, the premiums for insurance against war risks on vessels going to Vladivostok were very high,

(1) (1889) 16 R. 828.
(2) 4 D. J. & S. 500.
(3) 2 App. Cas. 636, at p. 645.
(4) [1901] P. 272, at p. 280.

namely, from 25 to 30 guineas per cent. If the vessels had been insured even at those rates, nearly all, if not all, the profit upon the charterparties would have disappeared; and at the date of the third charterparty it is not too much to say that the risks would have been practically uninsurable. Channell J. came to the conclusion that these charterparties were contracts which in themselves were such as to imperil the security of the mortgagees. The mere statement of the circumstances under which they were made appears to me to shew that the learned judge was clearly justified in coming to that conclusion of fact. In my judgment therefore, if we had only to deal with the fact that, under the circumstances existing at the date of these charterparties, the owners of the ships, being mortgagors, contracted that they should carry cargoes of coal to Vladivostok, the conclusion would have followed that those contracts were such as to imperil the subject-matter of the security, and so to impair the security, and therefore they were not binding on the mortgagees on the principle laid down by Lord Westbury in *Collins* v. *Lamport* (1), and recognised subsequently by Lord Cairns in *Keith* v. *Burrows*. (2)

The point was taken that this was a matter which could have been met by insurance. What the position of affairs would be by reason of the mere fact of non-insurance, in a case where there were no special circumstances of risk involved, we need not for the purposes of the present case consider. As was pointed out by Mathew L.J. during the argument, in an ordinary case, where there would be no difficulty in insuring against ordinary risks, such a question would not be very likely to arise. With regard to a case like the present, where it cannot be disputed that the contract is of such a kind as to put the security of the mortgagees in a high degree of jeopardy, and no insurance against such risks was in fact effected, it is not necessary to consider the question whether insurance or the possibility of insurance by the mortgagors would lead to a different conclusion; under the circumstances of this case no such point really arises. On the general principle of law that a mortgagee of a ship is not bound by a contract made by the

(1) 4 D. J. & S. 500. (2) 2 App. Cas. 636, at p. 646.

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mortgagor which is such as to impair his security, I think the judgment of Channell J. is absolutely right.

It was argued that the terms of the debenture trust deed in the present case gave to the mortgagors authority to bind the mortgagees by such a contract as is contained in these charter-parties. It is not necessary to go through the clauses of that deed at length, and it will be sufficient to summarize the provisions on which reliance was placed for the defendants. Clause 4 of the deed no doubt gives power to the mortgagors to continue to carry on business to the full extent authorized by their memorandum of association, and contains no terms by way of express limitation of their rights and powers. It should however be observed that, though with regard to the general undertaking the clause provides that the mortgage shall operate as a floating security, that is not to be the case with regard to the steamships, and no power is thereby given to sell or dispose of them. With regard to the ships, the rights of the parties are left, as it seems to me, to be determined by the general law on the subject. In my judgment clause 4 does not really give any greater powers to the mortgagors with regard to the ships than are conferred by law in the absence of any special terms. Then clause 24, among other things, provides that the mortgagors shall carry on their business to the greatest possible advantage, and that they shall give to the trustees for the mortgagees all such information as they shall require as to all matters relating to the business or to the affairs thereof; and it also provides for insurance of the ships in an office or offices appointed by the trustees and the deposit of the policies with the trustees, and further that, whenever required by the trustees so to do, the mortgagors shall insure the said vessels in such office or offices as aforesaid under proper marine policies against seizure, capture, and war risks. It was strenuously urged upon us that the effect of those provisions, taken together with those of clause 4, was to empower the mortgagors to bind the mortgagees by any contracts with regard to the ships, and there was no duty cast upon them to insure them against war risks, unless the trustees called upon them to do so. The first answer to that

contention appears to me to be the cogent observation made by Mathew L.J. to the effect that the operation of the clause as contended for must in any case depend upon proper information being given by the mortgagors to the trustees so that they may know against what war risks they ought to call on the mortgagors to insure. Furthermore it appears to me that clause 24 is one inserted for the protection of the mortgagees, and cannot be regarded as justifying the mortgagors in entering into contracts which may impair the security, or as rendering such contracts binding on the mortgagees. I think that, in the absence of proper information of these contracts given to the mortgagees, when they were made, clause 24 could not operate to prevent them from being invalid as against the mortgagees on the principle laid down in the cases to which I have alluded; and it also seems to me impossible to treat a clause inserted for the protection of the mortgagees as giving the mortgagors authority to bind the mortgagees by such contracts. I come to the conclusion therefore that the mortgagees in this case have done nothing to deprive themselves of their ordinary rights as such, and that they have not authorized the mortgagors to bind them by any contracts but those by which mortgagors are by law authorized in such cases to bind their mortgagees.

I wish to add only one or two observations on minor points. With reference to *The Celtic King* (1), I do not express any opinion to the effect that the principle on which we are deciding this case would apply in a case where the contract in question was made before the mortgage. It is not necessary to discuss that point in the present case. The only other point which I wish to mention is that, in the observations which I made, when dealing with the case of *The Heather Bell* (2) in conjunction with A. L. Smith L.J. and Romer L.J., I did not mean to say that non-insurance was not a matter to be considered in connection with such cases, but merely that, if the charterparty was otherwise binding on the mortgagee, the fact that the ship was not properly insured against ordinary perils of the sea might not of itself be sufficient to prevent the

(1) [1894] P. 175. (2) [1901] P. 272.

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charterparty from being binding upon him. The case of *Laming* v. *Seater* (1) in Scotland is in accordance with the view we are expressing. For these reasons I think that the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. It could hardly be contended in this case that the contracts were not such as to impair the security of the mortgagees, or that the destination of the ships did not place them in serious jeopardy. I understand the argument to be that, nevertheless, the mortgagees cannot treat these contracts as invalid, on the ground, first that, apart from the terms of the debenture trust deed, the mortgagors had authority to enter into them; and secondly that, if the mere relation of mortgagor in possession and mortgagee did not give them that authority, they had it under the terms of the deed. With regard to the first ground, the counsel for the defendants relied on certain observations of Willes J., in the case of *Johnson* v. *Royal Mail Steam Packet Co.* (2), as shewing that the relation between mortgagee and mortgagor is analogous to that between principal and agent; and they contended on the strength of those observations that the charterparties in the present case must be regarded as having been authorized by the plaintiffs. I do not think that the remarks of Willes J. were intended to have the effect contended for by the defendants' counsel. There is nothing clearer than that the mortgagee of a ship is not bound by contracts which the mortgagor in possession may make on his own account in respect of the ship. He has the security of the ship, but is clear of such liabilities. We are dealing here with a case in which the charterparties in question were entered into after the mortgage. I reserve my judgment on the question, which is not material in the present case, as to what would be the position of affairs where, as appears to have been the case in *The Celtic King* (3), the contract in question was made before the mortgage.

Now what are the facts in the present case? The mortgagees

(1) 16 R. 828.
(2) L. R. 3 C. P. 38, at pp. 41, 42.
(3) [1894] P. 175.

appear to have made all due efforts to obtain information as to the destination of these ships, but they failed to do so. The mortgagors having conceived the intention of sending them on this hazardous adventure, they appear to have deliberately concealed that intention and to have framed the fictitious documents which were calculated to give a false impression as to the destination of the ships. Their object would seem to have been to prevent the mortgagees from interfering, well knowing that mortgagors, as between themselves and their mortgagees, are not entitled to enter into contracts which impair the security.

It is contended that the mortgagors were authorized to enter into these contracts by the terms of the debenture trust deed; and for the purpose of that contention reliance is placed upon clause 4, by which the mortgagors are empowered to employ the ships in the business authorized by their memorandum of association, which, it is suggested, would include their employment as contemplated by the charterparties. I cannot agree with that suggestion. I think the shareholders in the defendant company might have intervened, and prevented the ships from being so employed. Then reliance is placed upon clause 24. The object of that clause is that the mortgagees may be informed how the ships are being employed; for the purpose, among others, as it appears to me, of preventing any deviation from the proper course of business with regard to their employment; and also in order that the mortgagees may, if they think it necessary, require that the ships shall be fully insured against the risks involved in their employment. In the present case that information was withheld, and consequently the mortgagees were not in a position to require that the ships should be insured against such risks as were involved in these charterparties. The defendants cannot be heard to complain of that, because it was their own fault. I have no doubt that, if the mortgagees had been informed of the real position of affairs, when the charterparties were entered into, they would have declined to sanction these transactions, and they would never have gone forward. I think the mortgagees have not interposed too late, and that, in accordance with the general principles

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of law on the subject, they are entitled to the declaration which they claim.

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COZENS-HARDY L.J. I am of the same opinion, and have very few words to add. The main principle applicable in such cases is not disputed, being that which was laid down in *Collins* v. *Lamport*. (1) On the question of fact one cannot doubt that the security of the mortgagees was seriously imperilled by these charterparties. They can, therefore, only be supported as against mortgagees, who have taken possession, by something to be found in the special terms of the mortgage deed itself. I have carefully considered the terms of the debenture trust deed, and I can find nothing in it to derogate from what may be called the common law rights of mortgagees. Clause 4, in substance, only provides that, being shipowners, the mortgagors may carry on their business as such, and use the ships for the purposes of that business until the mortgagees take possession of the mortgaged premises. Then it is said that, though that may be so with regard to clause 4 taken alone, clause 24 gives special rights to the mortgagors. When that clause is looked at, it appears to contain nothing in derogation of the rights of the mortgagees, but, on the contrary, provisions for additional protection to them. It provides that proper books shall be kept by the mortgagors, and for the inspection of them by the trustees for the debenture-holders, and for the effecting of ordinary insurances on the ships, and that, if required, they shall be insured against war risks. The provisions of the clause seem to imply that it is the duty of the mortgagors to give the trustees all proper information, so as to enable them to exercise the discretion given to them, and to require the insurance of the ships against war risks if they think it necessary. Nothing of the kind was done in this case; but on the contrary there was studious concealment of what was being done. I cannot find anything in the debenture trust deed to put the plaintiffs for the present purpose in any other than the ordinary position of mortgagees. One word only as to the case of *The Celtic King*. (2) I do not think that

(1) 4 D. J. & S. 500. (2) [1894] P. 175.

Barnes J. in that case intended to say that the doctrine of *Collins* v. *Lamport* (1) was generally applicable where the charterparty sought to be invalidated was made previously to the mortgage. There would appear to have been very special circumstances in that case. The agreement there in question was entered into before the ship was built, at a time when neither the ship nor the mortgage upon it could have been registered. Possibly that may have been the reason why the learned judge thought himself justified in deciding that such an agreement was under the circumstances invalid as against the mortgagees.

Appeal dismissed.

Solicitors for plaintiffs: *Gribble, Oddie, Sinclair & Johnson.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) 4 D. J. & S. 500.

E. L.

END OF VOL. I.